Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, establishes a federal program for the regulation of solid and hazardous wastes designed to protect human health and the environment. Petitioner alleged in its complaint that open field burning by neighboring farmers of massive amounts of post-harvest crop residue was presenting an imminent and substantial endangerment to human health that was actionable under RCRA because the crop residue constituted a "solid waste," which RCRA statutorily defines as "discarded material," including material from "agricultural operations." 42 U.S.C. § 6903(27). The court of appeals held that the complaint should be dismissed on the ground that the crop residue was not "discarded material" even if 99.9 percent of the reason for the burning was to get rid of it because the material would otherwise harm crop productivity.

The question presented is whether secondary material generated by an industrial, manufacturing, agricultural, or commercial activity is not "discarded" and therefore not "solid waste" subject to RCRA, whenever the generator can establish that destroying the material results in some incidental economic benefit in addition to the overriding and primary benefit of simply getting rid of the material.

PARTIES TO THE PROCEEDING

Safe Air for Everyone, also known as the Idaho Clean Air Foundation, Inc., was the appellant in the Ninth Circuit below. Wayne Meyer, William Dole, Michael Dole, Warren Dole, Jacquot Farms Enterprises, Inc., G. Wade McClean, Terry Nichols, Satchwell Farms, Inc., Wallace Meyer, David Asher, Terrell K. Baune, Baune Farms, Inc., Jeff Bloomsberg, Bergen Bothman, Arnold Brincken, Doug Bruce, Earl M. Clausen, Clausen Farms, Inc., Keith Daman, Paul Daman, Denny Bros., Chad Denny, Matthew Drechsel, Drechsel Brothers, Inc., Dennis Duncan, David Duncan, Chris Duncan, Joyce Duncan, Randy Duncan, David Fish, Thomas Freeburg, Gary French, Charles A. Hahner, Hahner Farms, Inc., Larry Hansen, Martin Hanson, Hatter Creek Farms, Inc., Don Hay, Larry Heaton, Clarence Heeg, Randy Holt, Duane Jenneskens, Dale R. Johnson, Ted Lacy, Phillip Lampert, Lampert Farms and Ranch, Inc., David Lampert, Eric Larson, Brian Lashaw, Mike Lashaw, Nick Lawson, Casey Lawson, Allen Lewis, Maple Leaf Farms, Inc., Herbert W. Millhorn, Millhorn Farms, Inc., Bruce Mills, Catherine Morris, Richard Morrison, Elmer Ness, Erling Place, Chris R. Ramsey, Michael Roecks, Rogada Farms, Inc., John Schultz, Karl Schultz, Joe Sievers, Ron Tee, Donald Thies, Alan Thomas, Gene Towne, Winday Hill Farms, Inc., Todd E. Wright, Gary Wright, Wrights, Inc. were all appellees in the Ninth Circuit below.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement	2
Reasons for Granting the Writ	12
I. The Ninth Circuit misconstrued the meaning of RCRA's statutory definition of "solid waste"	14
II. The Ninth Circuit's ruling seriously erodes RCRA's effectiveness in protecting human health and the environment	20
III. The Ninth Circuit's ruling conflicts with the rulings of other federal courts of appeals that have construed the same statutory language	25
IV. Review by this Court of the legal issue presented by this case is warranted now	28
Conclusion	30
Appendices	A1

TABLE OF AUTHORITIES

Cases:

American Mining Congress v. EPA,
824 F.2d 1177 (D.C. Cir. 1987) 21, 27, 28

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907 F.2d 1179 (D.C. Cir. 1990) 26, 28

American Petroleum Institute v. EPA,
906 F.2d 729 (D.C. Cir. 1990) 26

American Petroleum Institute v. EPA,
216 F.3d 50 (D.C. Cir. 2000) 25

Association of Battery Recyclers, Inc. v. EPA,
208 F.3d 1047 (D.C. Cir. 2000) 28

Board of Education v. Earls, 536 U.S. 822 (2002) 8, 29

Chemical Waste Management v. Hunt,
504 U.S. 334 (1992) 3

City of Chicago v. Environmental Defense Fund,
504 U.S. 906 (1992) 30

City of Chicago v. Environmental Defense Fund,
511 U.S. 328 (1994) 3, 4

Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct
& Sewer Auth., 888 F.2d 180 (1st Cir. 1989) 20, 22

Connecticut Coastal Fisherman's Ass'n v. Remington
Arms, 989 F.2d 1305 (2d Cir. 1993) 19, 21

Engine Manufacturers Ass'n v. South Coast Air Quality
Management Dist., 541 U.S. 246 (2004) 14

International Paper Co. v. Ouellette,
475 U.S. 1081 (1986) 30

Cases (continued):

Meghrig v. KFC Western, 516 U.S. 479 (1996) 3

Moon v. North Idaho Farmers Ass'n,
96 P.3d 637 (Idaho 2004) 24

Owen Electric Steel Co. of South Carolina v. Browner,
37 F.3d 146 (4th Cir. 1994) 26

Safe Food & Fertilizer v. EPA,
350 F.3d 1263 (D.C. Cir. 2003) 28

United States v. ILCO, Inc.,
996 F.2d 1126 (11th Cir. 1993) 25

United States v. Marine Shale Processors,
81 F.3d 1361 (D.C. Cir. 1996) 26

United States v. Self,
2 F.3d 1071 (10th Cir. 1993) 27

Statutes and Regulations:

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* 3, 23, 24

Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* 3, 23

Idaho Smoke Management and Crop Residue Disposal
Act, Idaho Code §§ 22-4801 to 22-4804 15

Idaho Code § 22-4803(a) 15

Idaho Code § 22-4803A(6) 24

Resource Conservation and Recovery Act (RCRA),
42 U.S.C. § 6901 *et seq.* ..... *passim*

42 U.S.C. § 6903(3) 17

42 U.S.C. § 6903(5) 4

Statutes and Regulations (continued):

42 U.S.C. § 6903(27) 2, 4, 23

42 U.S.C. § 6903(34) 17

42 U.S.C. § 6921(d) 5, 23

42 U.S.C. § 6921(d)(1) 23

42 U.S.C. § 6921(d)(2) 23

42 U.S.C. § 6972 ..... 7, 10, 19, 21, 25

42 U.S.C. § 6972(a)(1)(B) 2, 7, 24

42 U.S.C. § 6972(f) 24

40 C.F.R. §§ 261.1 - 261.4 ..... 5, 6, 18

40 C.F.R. § 261.1(b)(1) 5, 19, 22

40 C.F.R. § 261.1(c)(3) 20

40 C.F.R. § 261.2(a)(2) 6

40 C.F.R. § 261.2(a)(2)(i) 19

40 C.F.R. § 261.2(b)(2) 6, 19

40 C.F.R. § 261.2(c)(1) 6

40 C.F.R. § 261.2(c)(1)(ii) 6

40 C.F.R. § 261.2(c)(2)(i)(B) 6, 20

40 C.F.R. § 261.2(c)(2)(ii) 6

40 C.F.R. § 261.33 6

40 C.F.R. § 261.4(b)(2)(1) 17

Statutes and Regulations (continued):

ID Admin. Code, Tit. 6, Ch. 16, § 500 15

Miscellaneous:

American Heritage Dictionary of the English Language (4th ed. 2000) 15

T. Berry Brazelton & Joshua D. Sparrow, Touchpoints (Perseus Pub. 2002) 15

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p. 14473 22

p. 14492 6

50 Fed. Reg. 614 (1985) 5, 19, 21

pp. 616-618 22

p. 617 5

p. 618 19

p. 627 ..... 5, 19

p. 658 App. A 22

68 Fed. Reg. 61558 (2003) 5, 6, 19

p. 61561 ..... 6, 20

p. 61562 ..... 5, 19

Fed. R. Civ. Pr. 12(b)(1) 10

Miscellaneous (continued):

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. (1976) 3, 12

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Petitioner Safe Air for Everyone respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 373 F.3d 1035 and reproduced in the appendix hereto at Pet. App. A1. The opinion of the district court is unreported and is reproduced at Pet. App. A32.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 1, 2004. Pet. App. A1. The Ninth Circuit denied rehearing and rehearing en banc on October 5, 2004. Pet. App. A49. On December 22, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and included February 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1004(3), (5), (27), & (34) and 7002(a)(1)(B) of the Resource Conservation and Recovery Act, codified at 42 U.S.C. §§ 6903(3), (5), (27), & (34), 6972(a)(1)(B) are reproduced at Pet. App. A50.

STATEMENT

This case arises out of an action brought by petitioner, Safe Air for Everyone (SAFE), pursuant to Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B), alleging that respondents' burning of massive amounts of crop grass residue presents an "imminent and substantial endangerment," within the meaning of that statutory provision, and seeking injunctive relief. The district court dismissed the complaint on the ground that RCRA does not apply to respondents' activities because the burning of grass residue does not constitute a "disposal" of a "solid waste." A divided panel of the court of appeals affirmed, ruling that summary judgment in favor of respondents was proper. According to the appellate court, the grass residue is not a "discarded material," which is the RCRA statutory definition of "solid waste" (42 U.S.C. § 6903(27)), even if 99.9 percent of the reason for the burning is to get rid of the material so that the material does not harm crop productivity. Neither lower court disputed petitioner's evidence that respondents' burning of residue causes severe and widespread adverse human health effects, including the deaths of three residents and multiple hospitalizations of others.

Review of the Ninth Circuit's judgment is warranted. The court's reasoning is contrary to the plain meaning of the statutory language, ignores EPA's authoritative interpretation of that language, and threatens to create an extraordinarily broad "recycling" loophole that would allow easy circumvention of RCRA's important human health and environmental protections. The case also presents a wide and deep conflict in the federal circuit courts of appeals.

A. The Resource Conservation and Recovery Act.

The Resource Conservation and Recovery Act (RCRA) "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." Meghrig v. KFC Western, 516 U.S. 479, 483 (1996); see City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 331 (1994). RCRA was part of the second wave of the nation's modern environmental law statutes. The first wave, consisting of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, sought to achieve environmental protection by focusing on pollutants emitted into specific environmental media (*i.e.*, air and water). Congress passed RCRA in 1976 largely because of its increasing concern that an exclusively media-based approach would ultimately just shift pollutants to the path of least regulatory resistance, in particular to contaminate land and groundwater See Jeffrey G. Miller & Craig N. Johnston, The Law of Hazardous Waste Disposal and Remediation 2-3 (1996). That is why Congress intended that the purpose of RCRA would be to eliminate the "last remaining loophole in environmental law" by focusing on risks caused by waste management regardless of environmental media. H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. Pt. 1, at 4 (1976).

To that end, Congress authorized EPA in RCRA to regulate the management of solid and hazardous wastes from "cradle to grave." Chemical Waste Management v. Hunt, 504 U.S. 334, 337 n.1 (1992). RCRA's central jurisdictional term is "solid waste." While the Act imposes its "much more stringent" regulatory requirements on those who treat, store and dispose of "hazardous waste" rather than on those who manage "solid waste" (see City of Chicago v. Environmental Defense Fund, 511 U.S. at 332, 339), "hazardous waste" is a subset of "solid waste." In other words, unless a material is "solid waste" in the first instance, it cannot be considered "hazardous waste" within the meaning of RCRA.[1] The material falls wholly

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[1] The term "hazardous waste" means a *solid waste*, or combination of *solid wastes*, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –
(A) cause, or significantly contribute to an increase in mortality

outside of RCRA in all respects.

Congress, accordingly, broadly defined "solid waste" in RCRA to mean "any garbage, refuse, sludge * * * *and other discarded material* * * * *resulting from* industrial, commercial, mining, and *agricultural operations* * * *." 42 U.S.C. § 6903(27) (emphasis added).[2] The statutory touchstone for "solid waste," therefore, turns on whether the secondary material (*i.e.*, any material generated by "industrial, commercial, mining, and agricultural operations") is "discarded." Significantly, secondary material generated by agricultural activities is expressly included, not excluded, from the statutory definition.

RCRA, however, does have "twin goals," both of which are relevant in determining the meaning of "discarded material." City of Chicago v. Environmental Defense Fund, 511 U.S. at 339. As suggested by its name, RCRA seeks both to "encourag[e] resource recovery and protect[] against contamination." *Id.* Yet, these two goals "sometimes conflict." *Id.* Within the administration of RCRA, for instance, exempting all recycling of secondary materials from RCRA's regulatory requirements would certainly promote such resource recovery efforts. But the concomitant cost would be the failure to regulate the health and environmental risks created by those activities, many of which, especially burning and placement on land, present the same kind and degree of risk created by classic waste disposal and treatment activities such as

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or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (emphasis added).

[2] The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations * * *.

42 U.S.C. § 6903(27).

incineration and landfill. See Miller & Johnston, *supra*, at 3; Jan G. Laitos & Celia Campbell-Mohn, The Regulation of Toxic Substances and Hazardous Wastes 683 (2000).

Congress never delineates precisely in RCRA how the balance should be struck between these two goals. Congress, however, does make clear that material is not generally exempt from the meaning of "solid waste" simply because it is being recycled. In 1984, Congress added a provision requiring RCRA regulation of small volume generators of hazardous waste. See 42 U.S.C. § 6921(d). That specific provision commands EPA to establish hazardous waste management standards for small volume generators "sufficient to protect human health and the environment," including "standards applicable to the legitimate use, reuse, recycling, and reclamation of such wastes." *Id.*

EPA, charged by Congress with implementation of RCRA, has not promulgated regulations purporting to define the meaning of "solid waste" or "discarded material" as applied to recycling activities for the statute as a whole. The Agency has instead promulgated regulations that address the meaning of the statutory definition of solid waste as applied to recycling only for the purposes of administration of RCRA's hazardous waste program set forth in RCRA Subchapter C. 40 C.F.R. § 261.1(b)(1). EPA has consistently maintained that the statutory definition of "solid waste" applicable outside the context of Subchapter C is broader than the regulatory definition applicable only to hazardous wastes. See 50 Fed. Reg. 614, 627 (1985); 68 Fed. Reg. 61558, 61562 (2003).

In 1985, EPA first promulgated its detailed regulations addressing the meaning of solid waste as applied to recycling activities potentially subject to regulation under RCRA's Subchapter C hazardous waste management program. 50 Fed. Reg. 614 (1985); see 40 C.F.R. §§ 261.1 - 261.4. The Agency rejected the extreme positions of either exempting all recyclable materials from the meaning of solid wastes or including them all. 50 Fed. Reg. at 617. The Agency concluded that it would "ordinarily have jurisdiction to regulate most recycling activities" because "regulation of most of these activities is necessary to

protect human health and the environment." *Id.* EPA explained that it was "guided by the principle that the paramount and overriding statutory objective of RCRA is protection of human health and the environment. The statutory policy of encouraging recycling is secondary and must give way if it is in conflict with the principal objective." *Id.* at 618, *citing* 48 Fed. Reg. 14472, 14492 (1983) and H.R. Rep. No. 98-198, 98th Cong., 1st Sess., at 46 (1983).

EPA, accordingly, defined in its regulations two broad categories of recyclable secondary materials: "those that are classified as solid wastes when recycled, and are therefore subject to regulation under RCRA, and those that are not considered solid wastes when they are recycled, and thus are not regulated." 68 Fed. Reg. 61558, 61561 (2003). The dividing line for the Agency was between those recycling practices that the Agency considered "to be more akin to normal industrial production" and those recycling practices that bore "more resemblance to waste management" and therefore presented heightened health and environmental risks. *Id.*; see 50 Fed. Reg. at 616-618.

Although the resulting regulations draw a series of extremely technical and precise distinctions in their application to specific industries and industrial practices (see 40 C.F.R. §§ 261.1 to 261.4), the Agency broadly classified certain kinds of activities, including certain recycling activities, as warranting the conclusion that the secondary materials involved were being "discarded" and therefore constituted "solid wastes." Of particular relevance to this case, EPA concluded that material that is "abandoned" by being "burned or incinerated" is discarded material. 40 C.F.R. § 261.2(a)(2), (b)(2). In addition, secondary material that is "recycled" either by being "used in a manner constituting disposal," such as placement on land, or "used to produce a fuel," constitutes discarded material. *Id.* § 261.2(c)(1), (c)2)(i)(B).[3]

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[3] EPA's regulations included a few isolated exceptions for certain "commercial chemical products" specifically listed in its regulations, but those exceptions are not relevant to this case. See 40 C.F.R. § 261.2(c)(1)(ii), (c)(2)(ii); see *id.* § 261.33.

B. Proceedings Below

1. On May 31, 2002, petitioner, Safe Air for Everyone (SAFE), filed this action against respondents in the United States District Court for the District of Idaho pursuant to Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B). That statutory provision allows citizens to file suit against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* SAFE is a non-profit corporation, led by physicians concerned about the serious, adverse health effects of grass residue burning, formed for the sole purpose of taking action with respect to the health crisis that its members believe is being caused by grass residue burning. Respondents are 75 individuals and corporations that grow Kentucky bluegrass seed commercially in North Idaho and, after harvesting the seed, burn the grass residue that remains on the field. The burning takes place in two general areas: within the Rathdrum Prairie in Kootenai County, Idaho, and within the boundaries of the Coeur d'Alene Reservation. SAFE alleged in its complaint that the smoke and particulate pollution created by the massive open field burning has contributed to an imminent and substantial endangerment to public health in Idaho and Washington. Pet. App. A35; E.R. 1-29.[4]

SAFE moved for a preliminary injunction on its RCRA Section 7002 claim, supported by an extensive evidentiary submission of 121 fact and expert declarations and also by expert and witness testimony at a preliminary injunction hearing. This evidentiary submission and testimony addressed both the nature of respondents' disposal practices through burning and the resulting severe public health impact on surrounding communities. Pet. App. A2-A3; E.R. 58-194, 195, 198-205, 208-222, 226-235.[5]

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[4] "E.R." refers to Excerpts from the Record in Support of Plaintiffs-Appellants filed in the court of appeals.

[5] Because the court below upheld dismissal of the complaint on summary judgment, the evidence submitted must be viewed in the

Farmers typically plant Kentucky bluegrass in the spring, but the crop does not flower and produce seed until the following year. By the summer of that next year, the flowers have produced seed, and the grass plants are 15 to 36 inches tall. Growers, such as respondents, then cut the crop close to the ground, normally several inches high. The cut portion of the plant cures in the field for several weeks, which dries out the seed heads in preparation for combining. Pet. App. A2, A14.

After the bluegrass straw is cured, a combine separates the seed from the straw, then deposits the seed into a bin and places the straw back onto the field. The growers must remove this grass residue from the field at a later time. Otherwise, bluegrass, a perennial crop that can produce seed for several years from a single planting, will not effectively produce seed in the following years. If left on the field, the residue will keep sunlight and moisture from reaching the crown of the plant during the critical fall re-growth period. Pet. App. A29 n.9; see note 6, *infra*.

Respondents all get rid of the residue by open field burning, which is the most inexpensive method of residue removal. Ridding the field of the grass residue to allow for sunlight and moisture to reach the soil underneath is 99.9 percent of the reason for its removal.[6] The fire also eliminates some insects and pesticide residue and molds that would otherwise find food and shelter in the crop grass residue. The ash remaining after the fire can contain some small amounts of organic matter, including nitrogen, valuable to the farmer as a fertilizer for the soil. Pet. App. A13-A15; E.R. 223.

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light most favorable to the petitioner, as the non-moving party. See Board of Education v. Earls, 536 U.S. 822, 849 (2002).

[6] As the court of appeals noted (Pet. App. 14 n.11), one witness, Donald Jacklin, testified that "99.9 percent" of the reason for burning the residue was the "photo induction enhancement of seed yield." E.R. 223; Pet. App. A58-A59. Jacklin further explained that the photo induction enhancement occurs because burning "rids the surface" of the grass residue and the increased seed yield then occurs because the bare soil is exposed to the sunlight for a longer period of time. *Id.* Accordingly, it is exclusively the residue's removal that produces this benefit. The relevant testimony is set forth at Pet. App. A58-A59.

Respondents engage in open field burning of grass residue on a seasonal basis on over 7000 acres on the Rathdrum Prairie and on over 30,000 acres within the Coeur d'Alene Reservation. The burning produces massive clouds of smoke containing high concentrations of pollutants, including particulate matter, that cause severe adverse human health impacts. Pet. App. A2; E.R. 58-130. The State of Washington has, due to these adverse health effects, completely banned such burning and the State of Oregon has mostly banned the practice. Farmers in those States comply by removing the grass residue mechanically. See Pet. App. A13, A41 & n.4; E.R. 218.

Petitioner's complaint alleged, and its detailed evidentiary submission and hearing testimony established, that the smoke plumes from the burning reach residential communities[7] and that the resulting serious and widespread health effects include increased coughing, respiratory illness, difficulty breathing, decreased lung function, and lung disease. The evidence further demonstrated that health effects are greater for infants, children and the elderly, asthmatics, and those with chronic heart or lung disease. Underscoring the potential severity of these impacts, petitioner's submission established that three North Idaho citizens have died in recent years from episodes of acute respiratory distress precipitated by grass residue burning and that many other citizens have had adverse reactions to the burning so severe that they could have died without immediate medical attention.[8] SAFE also submitted one hundred

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[7] A photograph submitted into evidence shows clouds of smoke produced during open field burning in close physical proximity to a residential neighborhood. See Pet. App. A60 (June 3, 2002, Declaration of Arthur Long, Exhibit F).

[8] For instance, the Kootenai County Coroner submitted a declaration and testified at the trial court hearing that Marsha Mason, a resident of Rathdrum, Idaho, died as a direct result of grass residue burning. The official Coroner's death certificate expressed his opinion, "to a reasonable degree of medical certainty, that Marsha Mason's death was caused by status asthmaticus precipitated by exposure to severe air pollution from grass field burning." See E.R. 122. Another resident described how his wife collapsed and died, at age 37, after being exposed to smoke from grass residue burning. See E.R. 191. Similarly,

declarations from citizens whose lives and health have been adversely affected by grass residue burning. E.R. 58-194, 195, 198-205, 198-222, 232-235.

2. The district court granted respondents' motion to dismiss. Pet. App. A47.[9] The court did not question any of petitioner's evidence concerning the severity of the adverse health impacts caused by respondents' open field burning of massive amounts of grass residue. The court based its dismissal exclusively on its conclusion of law that the grass residue was not a "solid waste" and therefore the burning of the grass residue was not a "disposal" of "solid waste." *Id.* at A39.

3. With one judge dissenting, the court of appeals affirmed. Pet. App. A19.[10] The court held that SAFE had "failed to demonstrate that a genuine issue of material fact exists as to whether grass residue is 'solid waste' under RCRA." *Id.* at A2. Like the district court, the court of appeals did not question the validity of the evidence of the very severe and widespread adverse human health effects, including the death of three residents, caused by the open field burning of the grass residue. *Id.* at A19 n.15.

According to the court of appeals, summary judgment was compelled because, even viewing the evidence in the light most favorable to petitioner, "there is no dispute that [respondents] realize farming benefits from reusing grass residue in the process of open burning." Pet. App. A15. The court did not question the validity of petitioner's evidentiary submission "that the two most important

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a mother described the effect of the smoke on her 10-year-old daughter, who suffers from cystic fibrosis and who had to be hospitalized because of her exposure. See E.R. 180.

[9] The district court characterized its dismissal as a dismissal for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Pr. 12(b)(1), reasoning that because crop residue did not amount to a "solid waste," RCRA Section 7002 did not provide jurisdiction over the complaint. Pet. App. A34.

[10] The court of appeals affirmed the district court's judgment, but not its conclusion that there was a lack of subject matter jurisdiction. See note 9, *supra*. The court of appeals held that there was subject matter jurisdiction, but then granted summary judgment on the merits for respondents. Pet. App. A6-A7, A19.

benefits from open burning of grass residue, sunlight absorption and enhancing productive life of bluegrass fields, result from the removal of grass residue," and that the other purported benefits – "the fertilizer in the ash and reduced pesticide use" – are merely "incidental benefits." *Id.* The court likewise assumed the validity of testimony that the farming benefits obtained by simply ridding the surface of the fields of the grass residue was "99.9 percent" of the reason why respondents engaged in such open field burning. *Id.* at A14 n.11. The court also accepted the testimony of petitioner's expert that the amount of organic matter "that remains after burning provides little benefit to the soil." *Id.* at A14 n.12. The court nonetheless reasoned that so long as there were any benefits from the open field burning, no matter how incidental to the overriding and "primary" purpose of simply getting rid of the grass residue, the residue could not be considered "discarded" under "RCRA statutory language." *Id.* at A14-A15. Finally, the court rejected petitioner's contention that the fact that respondents were burning the grass residue was relevant to whether the material was being discarded. *Id.* at A17 n.13. The court ruled that "[t]he determination of whether grass residue has been 'discarded' is made independently of *how* the materials are handled." *Id.* (emphasis in original).

Judge Paez dissented. Pet. App. A20. He reasoned that "[b]ecause there is no dispute that [respondents] burn the post-harvest crop residue to remove it from the fields, and because this act of removal is within the plain meaning of 'discard,'" the district court's judgment should have been reversed. *Id.* at A22. The dissent stressed that respondents "admitted that the residue had to be removed from the fields in order to maintain seed production and to limit the insects and parasites that would otherwise find food and shelter in the residue." *Id.* at A21.

REASONS FOR GRANTING THE WRIT

Congress sought by enacting the Resource Conservation and Recovery Act to eliminate the "last remaining loophole in environmental law." H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. Pt. 1, at 4 (1976). Perversely, however, by ignoring the plain meaning of the statutory language, the Ninth Circuit's construction of RCRA's central jurisdictional term – "solid waste" – would create a loophole that would defeat RCRA's ability to protect human health and the environment from injuries caused by the mismanagement of solid and hazardous wastes. Under the court of appeals' proffered construction, the term "solid waste" would not extend to any secondary material susceptible to some beneficial use, no matter how incidental in nature. Indeed, RCRA would not even apply where, as here, the primary "benefit" is avoiding the harm the material would otherwise cause and that "benefit" is therefore achieved by destroying the material. The lower court's reading simply cannot be squared with the plain meaning of "discard."

Because, moreover, "hazardous waste" is a subset of solid waste, the implications of such a judicial misconstruction of RCRA's language immediately extend to both RCRA's solid and hazardous waste programs. Generators of secondary materials from industrial, manufacturing, and agricultural practices could engage in classic waste disposal activities – in this case, the burning of massive amounts of such material in open fields – and avoid any RCRA regulation. They could, based on the Ninth Circuit's ruling, rely on the incidental fact that their secondary material, like virtually all secondary material, includes some constituents with residual economic value, whether as "fuel" as in this case, or as "dust suppressant" as in Times Beach, Missouri, or as construction "fill" as in Love Canal, New York. See Robert Reinhold, *U.S. Offers to Buy All Homes in Town Tainted by Dioxin*, NYT A1:6 (Feb. 23, 1983); Donald G. McNeil, *Upstate Waste Site May Endanger Lives*, NYT A1:1 (Aug. 1, 1978).

For more than twenty years, EPA has reconciled RCRA's competing objectives – promotion of recycling

and protection of public health and the environment – by rejecting a broad recycling exemption from the definition of "solid waste." The Agency has defined the term in a manner designed to protect public health and the environment from waste mismanagement while exempting only certain narrowly defined, low risk, recycling activities. EPA concluded that otherwise RCRA's objectives could not be accomplished. For that same reason, however, by rejecting EPA's threshold construction of the jurisdictional term "solid waste," the court of appeals' ruling completely unsettles the Agency's entire regulatory program.

The Ninth Circuit's ruling also creates a wide and deep circuit conflict. Five federal courts of appeals have rejected the Ninth Circuit's reading of RCRA in a variety of ways. In sharp contrast to the Ninth Circuit, each of those other circuits has endorsed the essential proposition that a generator of solid waste cannot evade the statute's requirements simply by exploiting the fact that the secondary material has some residual economic value for the generator's business. They have also taken sharp issue with the Ninth Circuit's view that the manner of recycling – in this case, destruction by burning – is irrelevant to the question whether the material is being discarded.

Review by this Court is warranted in this case to provide clarity on a pure question of law of critical importance to the implementation of one of the nation's most significant environmental protection statutes. RCRA's regulatory reach and ambition are too widespread to tolerate so much uncertainty regarding the meaning of its central jurisdictional term. As underscored by this case, the human costs of that uncertainty are also massive. Respondents' activities are causing serious adverse health effects, including hospitalizations and even deaths. The petition for a writ of certiorari should be granted.[11]

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[11] Because the Ninth Circuit's ruling has such profound implications for EPA's administration of RCRA, the Court may wish to invite the Solicitor General to file a brief expressing the views of the United States. See note 25, *infra*.

I. The Ninth Circuit misconstrued the meaning of RCRA's statutory definition of "solid waste"

The decision of the Ninth Circuit is inconsistent with the plain meaning of RCRA's statutory language defining "solid waste," RCRA's structure and purpose, and EPA's authoritative regulations construing that same statutory language for the purposes of RCRA's hazardous waste management program. The Ninth Circuit did not dispute that respondents' primary reason for open field burning of grass residue was the destruction of that secondary material because of the harm the residue would otherwise cause. Indeed, the court was willing to assume that getting rid of the grass was 99.9 percent of the reason for its burning. See pages 8 & note 6, 10, *supra*. According to the court, however, so long as some "farming benefits" were realized from that burning, the residue's destruction did not render that material "discarded." The court further elaborated that "[t]he determination of whether grass residue has been 'discarded' is made independently of *how* the material is handled." Pet. App. A18 n.13.

The Ninth Circuit's reasoning is triply flawed. First, when 99.9 percent of the reason that a person is burning material is to get rid of it, such material is being "discarded" within the plain meaning of that term. Second, farming benefits produced by the material's destruction do not defeat classifying the grass residue as "discarded material," and therefore as "solid waste," within the plain meaning of RCRA. Third, the determination of whether the grass residue has been discarded *cannot* be made "independently" of how the materials are handled because the manner of their handling is, as in this case, often the most pertinent evidence that the material is in fact being discarded.

1. First, the Ninth Circuit's ruling gives mere lipservice to this Court's frequent admonition that "'[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" Engine Manufacturers Ass'n v. South Coast Air Quality Management Dist., 541 U.S. 246 (2004), slip op. 5, *quoting* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S.

189, 194 (1985). The ordinary meaning of "discard" in its statutory context is "to cast off, cast aside, reject, abandon, give up." Oxford English Dictionary, 728 (2d ed. 1989); see American Heritage Dictionary of the English Language, 514 (4th ed. 2000) ("to throw away; reject"); Random House Webster's Unabridged Dictionary, 561 (2nd ed. 1997) ("to cast aside or dispose of; get rid of"). It cannot be seriously contended that getting rid of secondary material produced by industrial, manufacturing, agricultural or commercial activities must be the exclusive (100%) reason for its destruction or abandonment before such material can be considered "discarded" and therefore solid waste. A person might well enjoy the incidental aerobic benefit of fresh air and exercise from taking the garbage out to the curb once a week. Or a parent might correctly believe that it is extremely important to have his or her child perform that errand to learn how to accept responsibility by doing household chores.[12] But it defies even the barest notions of commonsense and understanding to suppose that such an incidental benefit removes the garbage being taken out to the street from the solid waste category.[13]

The Ninth Circuit, however, did just that. It concluded that the grass residue was not "discarded," even if 99.9 percent of the reason for its burning was to get rid of it. See note 6, *supra*. According to the court (Pet. App. A14-16), so long as it could point to some other benefits, for instance, small amounts of nitrogen in the resulting ash, the grass residue was outside the plain meaning of "discarded material" no matter how incidental the value

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[12] See T. Berry Brazelton & Joshua D. Sparrow, Touchpoints 3 to 6, 339 (Perseus Pub. 2002); see also The Coasters, Yakety Yak, on The Very Best of the Coasters (Rhino Records 1994) ("*Take out the papers and the trash or you don't get no spending cash -- if you don't scrub that kitchen floor you ain't gonna rock'n'roll no more -- Yakety yak, don't talk back*").

[13] The State of Idaho's own statutory program further confirms the plain meaning of RCRA's statutory definition of solid waste as applied to respondents' practices. The Idaho legislature enacted in 1999 the Idaho Smoke Management and Crop Residue Disposal Act, Idaho Code §§ 22-4801 to 22-4804. That state law specifically refers to open field burning as "disposing of crop residue." *Id.* § 22-4803(a); see ID Admin. Code, Tit. 6, Ch. 16, § 500 (rules applicable to "[a]ll persons intending to dispose of crop residue through burning").

of nitrogen was to the respondents' overriding purpose of material destruction. The Ninth Circuit's claim notwithstanding, the plain meaning of "discarded material" cannot be fairly said to command that result.

2. The Ninth Circuit's second error lies in its reliance on the fact that the burning of crop grass residue produced "farming benefits." Pet. App. A15. The court's mistake was its complete failure to apprehend the legal significance of the fact that almost all of those benefits resulted from getting rid of the wastes.

We do not deny that there were farming benefits to be obtained from getting rid of the crop residue. Of course there were. But the mere existence of some economic advantage, even if substantial, to material destruction does not convert the material being destroyed into something other than solid waste and its destruction into something other than the disposal or treatment of solid waste.

The facts of this case are illustrative. As the court of appeals itself acknowledged, respondents' destruction of grass residue served several beneficial purposes because the presence of the residue would otherwise cause significant harm by impeding future crop productivity. For instance, getting rid of the grass residue was primarily necessary in order to expose the plant crown to sunlight, air, and water. Pet. App. A14-A15, A21-A22; see note 6, *supra*. Destruction of the grass residue also rid the soil of possible weed growth. *Id.* Finally, the burning destroyed some insects, pesticide residue and molds that would otherwise find food and shelter in the grass residue. *Id.*[14]

But rather than demonstrating that the grass residue was not being discarded, each of these alleged farming benefits conclusively establishes the correctness of the opposite conclusion. Although the lower court tries mightily to characterize these as "farming benefits" of the grass residue (Pet. App. A15), each is firmly rooted in respondents' desire to get rid of the residue by its incineration because of the harm the material would otherwise cause to future crop productivity. The purported benefits come from the advantages of the

[14] See Supplemental Excerpts from the Record in Support of Defendants-Appellees, 11, 15.

secondary material *being destroyed.* Whatever ambiguity might possibly exist in the meaning of "discard" in other contexts, no such ambiguity exists in terms of its application to material destruction. Such destruction constitutes classic abandonment or discard under longstanding and well settled understandings of the meaning of that word.[15]

Nor does the fact that the grass residue serves as the fuel of its own destruction take it outside the plain meaning of "solid waste." Pet. App. A15. Much waste can be burned. That the material's chemical composition allows it to burn does not render its incineration a "beneficial" reuse of material rather than a "discard." Yet, that is essentially what the Ninth Circuit held.

Finally, the court of appeals' reliance (Pet. App. A13-A16) on the fact that some incidental amounts of nitrogen contained in the ash residue can be returned to the soil as "fertilizer" is misplaced. At most, those nominal amounts of nitrogen would themselves not be considered "solid waste" because they are not being "discarded." But that possibility does not immunize the much larger amount of post-harvest grass residue from being a "solid waste." Such an outcome would be far more than even the proverbial tail wagging the dog. It would more closely approximate a single hair on the tail of the dog doing so.

Indeed, EPA's regulations make quite clear the Agency's view that secondary material generated by "[t]he growing and harvesting of agricultural crops" and then "returned to the soil as fertilizers" is a "solid waste." 40 C.F.R. § 261.4(b)(2)(1). In exercising Agency authority to exclude such materials from the narrower definition of

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[15] That the crop residue at issue in this case falls within the plain meaning of "discarded material" is further reinforced by RCRA's definitions of both waste "disposal" and "treatment." "Disposal" means the "placing of any solid waste * * * into or on any land * * * so that such solid waste * * * or any constituent thereof may enter the environment or be emitted into the air * * *." 42 U.S.C. § 6903(3). "Treatment" refers to "any method, technique or process * * * designed to change the physical * * * character or composition of any hazardous waste * * * so as to render such waste nonhazardous * * * or reduced in volume." *Id.* § 6903(34). Respondents' activities are the kind Congress contemplated in describing both "disposal" and "treatment."

hazardous wastes, EPA regulations expressly refer to these materials as "solid wastes" and determine that they should be excluded only from the category of "hazardous waste" based on their return to the soil. Hence, the regulations both make clear that the crop residue is solid waste even if returned to the soil as fertilizer and never intimate that residue that is burned and not returned to the soil is not a solid waste, as the Ninth Circuit held.[16]

Even if, moreover, the plain meaning of the statutory exclusion was not sufficient, standing alone, to defeat the lower court's reading, EPA regulations interpreting that statutory exclusion (which the court below completely ignored) compel rejection of that reading. EPA's detailed regulations address an ambiguity in the application of the statutory definition of "solid waste" to some kinds of recycling activities. The ultimate source of that ambiguity is located in RCRA's dual and sometimes conflicting purposes of promoting such recycling - to reduce the amount of solid waste - while simultaneously seeking to protect human health and the environment from the very real risks caused by management of secondary materials, including some management that can be fairly (and some unfairly) dubbed "recycling."

Yet, notwithstanding their complexity as applied to some kinds of recycling activities, EPA's regulations leave no doubt as to the regulatory status of the kind of activities relied upon by the Ninth Circuit in this case to escape RCRA's protective scope. Those regulatory efforts to distinguish between the status under RCRA of various kinds of recycling activities, ranging from closed loop industrial processes to offsite reclamations (see 40 C.F.R. §§ 261.1 - 261.4), create a regulatory labyrinth. But, as applied to this particular case, all roads in this labyrinth lead to the same clear conclusion: open burning of

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[16] EPA, therefore, has rejected the sweeping significance given by the Ninth Circuit to House Report language that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." Pet. App. A17, quoting H.R. Rep. 94-1491, 94th Cong., 2d Sess. 3 (1976). But the lower court's reading was in all events clearly misguided because the report language does not even purport to speak to the status of materials not returned to the soil but instead, as here, burned.

agricultural crop residue constitutes handling, treatment, or disposal of discarded material under the plain meaning of "solid waste" and EPA's authoritative construction.[17]

3. The Ninth Circuit's third error is no less fatal to its decision than the first two. Contrary to the court of appeals' ruling (Pet. App. A18 n.13), the determination of whether secondary material is being discarded can most certainly *not* be made "independently of how the materials are being handled." As forcefully explained by Judge Paez in his dissent below, "the fact that the residue is burned, rather than mulched and returned to the soil, *is* relevant to whether the residue constitutes 'solid waste' under RCRA." Pet. App. A24 n.6 (emphasis added).

Here again, the Ninth Circuit wholly ignored that EPA agrees with Judge Paez. Agency regulations define whether materials are being "discarded" based precisely on how the materials are being handled. See 50 Fed. Reg. 614, 618 (1985) ("solid waste" determination based on two inquiries: "both what the material is and how it is being recycled"). The regulations specifically provide that a "discarded material is any material which is * * * abandoned" and then further provide that "materials are solid waste if they are abandoned by being * * * burned or incinerated." 40 C.F.R. §§ 261.2(a)(2)(i), 261.2(b)(2). Respondents, of course, are doing just that: abandoning the crop residue by incineration. In addition, EPA's regulations likewise defeat the Ninth Circuit's assumption

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[17] Although EPA's regulations address only the question of the meaning of "solid waste" in RCRA's Subchapter C hazardous waste program (see 40 C.F.R. § 261.1(b)(1)), the regulations are relevant to this case because they represent EPA's authoritative construction of the same statutory language interpreted by the Ninth Circuit below and EPA has long construed the meaning of "solid waste" in the hazardous waste context as narrower, not broader, than in the statute as a whole, including Section 7002. 50 Fed. Reg. 614, 627 (1985); 68 Fed. Reg. 61558, 61562 (2003); see Connecticut Coastal Fisherman's Ass'n v. Remington Arms, 989 F.2d 1305, 1315 (2d Cir. 1993); Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct & Sewer Auth., 888 F.2d 180, 187 (1st Cir. 1989). Hence, if a secondary material constitutes "solid waste" for the purposes of Subchapter C, notwithstanding its nexus to recycling, that same secondary material would have to constitute "solid waste" for the purposes of Section 7002. The former is narrower, and never broader, than the latter. See pages 22-23, *infra*.

that the crop residue can avoid being classified as solid waste because respondents are "recycling" the residue by using it as "fuel" to blacken the soil or to eliminate insects within the residue. EPA's regulations expressly provide that recycling in this precise manner – using the secondary material as a fuel for burning – renders the material a "solid waste." See 40 C.F.R. § 261.2(c)(2)(i)(B).[18]

II. The Ninth Circuit's ruling seriously erodes RCRA's effectiveness in protecting human health and the environment

The legal issue presented by this petition concerns the meaning of the key jurisdictional term of one of the nation's most important environmental protection laws. The term "solid waste" determines RCRA's scope because RCRA seeks to regulate unreasonable risks to human health and the environment only to the extent that such risks are presented by "solid waste." RCRA offers protections, such as those established by Section 7002, against threats caused by mismanagement of solid wastes in general, but the Act focuses its most stringent requirements on those solid wastes that also meet the statute's criteria for being considered "hazardous" as well. See page 3, *supra*. RCRA's effectiveness in addressing human health and environmental risks created by mismanagement of secondary materials is therefore directly and immediately dependent upon the construction of the statutory term "solid waste." That is why courts and EPA refer to it as RCRA's "pivotal jurisdictional term," the meaning of which is "critical" because it plays a "key role in defining the scope of EPA's

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[18] Under EPA's classifications of different types of secondary material, respondents' grass residue would be a "by-product" (40 C.F.R. § 261.1(c)(3)), which, when used as a fuel, is a solid waste (*id.* § 261.2(c)(2)(i)(B)). The court of appeals also erred in positing (Pet. App. A15) that it was not factually disputed whether the burning benefitted the soil by blackening it. The expert witness upon whom the panel relied testified that he performed a comprehensive literature search and found no reference to soil blackening as a benefit of burning bluegrass. E.R. 253.

RCRA's authorities."[19]

For this same reason, the implications of the Ninth Circuit's narrow interpretation of "solid waste" is no less than staggering in terms of its impact on RCRA. The Ninth Circuit's reading would completely eviscerate the statute's ability to protect human health and the environment by effectively eliminating the statute's application to secondary materials susceptible to some, even fairly nominal, recycling. The court below has, in practical effect, created a gigantic loophole from regulation in a law that, ironically, Congress intended to close the last remaining loophole in environmental law. Not only would citizens lose the ability, as in this case, to use Section 7002 to challenge waste management activities that present imminent and substantial endangerments to their health, but RCRA's entire hazardous waste program would be seriously jeopardized.

1. For more than two decades, a central pillar of EPA's hazardous waste program under RCRA has been the Agency's 1985 rulemaking that the statutory language "solid waste" could be reasonably construed to include many materials subject to recycling and therefore RCRA's strict management requirements could apply to related recycling activities. See 50 Fed. Reg. 614 (1985); pages 5-6, *supra*. If, as the Ninth Circuit ruled in this case, the plain meaning of the statutory definition of "solid waste" does not extend to materials subject to the kind of recycling accomplished here, including burning for destruction, burning as "fuel," and burning to recover incidental chemical constituents in residual ash, then EPA would have no authority to construe that same statutory language anywhere in RCRA, including its hazardous waste program. The wide ranging kinds of recycled materials and recycling activities that EPA has for two decades concluded must be regulated as "hazardous waste" to accomplish RCRA's important objectives would

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[19] American Mining Congress v. EPA, 824 F.2d 1177, 1187 (D.C. Cir. 1987); Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1308 (2d Cir. 1993); 68 Fed. Reg. at 61561.

instead necessarily fall outside the statute's reach.[20]

2. Nor can this direct and far-reaching consequence of the court's ruling be avoided on the ground that EPA has made clear that its RCRA regulations construing "solid waste" apply only to its hazardous waste program. See 40 C.F.R. § 261.1(b)(1); page 5, *supra*. To be sure, if EPA were contending that the term "solid waste" somehow had a *broader* meaning in the context of the hazardous waste program than under the statute in general, such an argument could be fairly made. But, it most certainly cannot be fairly made where, as here, the reason for EPA's disclaimer in its hazardous waste regulations is its opposite determination that the term "solid waste" should have a *narrower* meaning in the hazardous waste context than in the statute as a whole.[21] A plain meaning

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[20] EPA concluded that the definition of "solid waste" should include most recycling activities because otherwise the Agency could not effectuate congressional intent to protect the public from the health and environmental threats presented by such activities. See 48 Fed. Reg. 14472, 14473, 14502-505 (1983); 50 Fed. Reg. 614, 616-618 (1985). To be sure, EPA did narrowly define some recycling activities, such as closed loop industrial processes, as not warranting such regulation, but the Agency's general policy was one of regulatory inclusion in seeking to define the kinds of recycling activities that were sufficiently akin to disposal (such as burning as fuel and placement on land) as to warrant heightened control. See page 5, *supra*. In justification of its decision, EPA included in its rulemaking a lengthy list of 67 hazardous waste sites around the nation, many of which were then on the Superfund National Priority List, that had been created by "recycling activities." 50 Fed. Reg. 614, 658 App. A (1985). Not surprisingly, many of these sites contained wastes that had avoided early RCRA regulation because industry had claimed that the materials involved were not waste but instead "fuel" capable of being burned. *Id.* Indeed, it was the desire to avoid more such Superfund sites that was largely why EPA decided in 1985 that RCRA's definition of "solid waste" should extend to many recyclable materials, especially those involving burning as fuel and placement on land. *Id.*

[21] EPA chose to construe more narrowly the term "solid waste" as applied to its hazardous waste program in order to avoid unduly chilling certain kinds of recycling activities that the Agency determined did not present the degree of health and environmental risks that warranted the full application of RCRA's very stringent requirements applicable to hazardous waste management. Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Authority, 888 F.2d 180, 187 (1st Cir. 1989).

construction of "solid waste," like that adopted by the Ninth Circuit below, that exempted virtually all recycled materials and recycling activities, would necessarily bar EPA from regulating such materials and activities under its Subchapter C hazardous waste program. If they fall outside the statutory definition of solid waste, they would necessarily fall outside the regulatory definition.

3. Like the statutory language, the statutory structure supports EPA's decision. In 1984, Congress amended RCRA to provide for regulation of small quantity generator waste, which had previously been exempted. See 42 U.S.C. § 6921(d). The new law required the EPA Administrator to promulgate generator, transporter, and treatment, storage and disposal requirements applicable to such waste. *Id.* § 6921(d)(1). But, for the purposes of this case, what is relevant is that Congress further provided that such standards should likewise be "applicable to the legitimate use, reuse, recycling, and reclamation of such wastes * * *." *Id.* § 6921(d)(2). Congress, therefore, clearly contemplated that the category of "solid wastes" would extend to material being recycled. Congress understood the health and environmental risks caused by these activities and their close kinship to classic disposal activities (see note 20, *supra*) and, accordingly, instructed EPA to ensure that "such standards shall be sufficient to protect human health and the environment." *Id.*

4. Finally, there is no merit to the Ninth Circuit's apparent belief (Pet. App. A19-A20 n.16) that the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, justifies the court's crabbed reading of RCRA. RCRA nowhere suggests that waste management activities potentially subject to Clean Air Act air emissions controls are exempt from RCRA regulation as "solid wastes." Indeed, when Congress wanted to create just that type of exclusion, it did so narrowly and expressly, as it did by excluding from the statutory definition of solid waste "solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under [Section 402 of the Clean Water Act]." 42 U.S.C § 6903(27). Absent such an explicit exclusion, there is no room within RCRA's plain

statutory terms to read into the Act a far more expansive Clean Air Act exception, especially when RCRA's driving purpose was to eliminate statutory loopholes and gaps.

Indeed, RCRA 7002(a)(1)(B), the citizen suit provision upon which petitioner relies in this case, is specifically aimed at filling the very kind of statutory gap presented here. Congress did not condition the right of a citizen to bring a suit under Section 7002(a)(1)(B) on the threshold showing of any violation of any specific requirement of a federal environmental law, whether based in RCRA, the Clean Air Act or any other law. Congress instead deliberately created a catch-all provision designed to provide judicial redress whenever an "imminent and substantial endangerment to health" is presented by the "handling, storage, treatment, transportation of any solid or hazardous waste." 42 U.S.C. § 6972(a)(1)(B). Congress created this public health safety net without regard to the precise environmental media (*i.e.*, air, water, land) by which the threat was conveyed in order to guard against the possibility that statutory gaps and loopholes might otherwise leave the public unprotected from serious human health hazards from environmental contamination. See Richard B. Skaff, *Emergency Provisions in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 Harv. Envt'l L. Rev. 298, 300-303 (1979); H.R. Rep. No. 98-198, 98th Cong. 2d Sess. Pt 1, 47-49 (1984). It is, accordingly, no answer to the plain meaning of RCRA, including Section 7002(a)(1)(B), to contend that SAFE should look elsewhere for judicial redress.[22]

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[22] Nor is the possibility of an action under state nuisance law a reason to deny relief in this case. RCRA does not supplant state nuisance law (42 U.S.C. § 6972(f)), but neither does state nuisance law supplant RCRA Section 7002(a)(1)(B). There is particular reason, moreover, not to do so in this case because of the tendency of many States, including Idaho, to create statutory provisions that immunize agricultural practices from common law nuisance lawsuits. Indeed, at the behest of some respondents in this case, Idaho recently enacted a state law effectively immunizing them from any possible state tort nuisance or trespass action based on harm caused by open field burning, no matter how severe the human health consequences. See I.C. § 22-4803A(6). Not only do such legislative enactments raise substantial constitutional concerns, in light of their negative impact on both private property values and human health (see Moon v. North

Congress concluded differently.

III The Ninth Circuit's ruling conflicts with the rulings of other federal courts of appeals that have construed the same statutory language

The Ninth Circuit's extraordinary ruling that a secondary material falls outside the statutory definition of "solid waste," even if 99.9 percent of the reason for its destruction is to get rid of it, because the material's destruction is "beneficial," finds no support in any decision of any other federal court of appeals. The divided panel's ruling, moreover, is indicative of growing confusion in the courts of appeals concerning the meaning of "solid waste" as applied to recycling under RCRA. That this confusion could have produced an appellate ruling in such defiance of RCRA's plain meaning and overriding purpose strongly counsels in favor of this Court's review.

1. Five other circuits have rejected the Ninth Circuit's central view that "solid waste," within the meaning of RCRA, cannot extend to secondary materials when being recycled so long as such recycling provides some economic "benefits" to the recycler. They also all further refute the extreme notion that material can be destroyed without being "discarded" if it is beneficial to destroy material that would otherwise be harmful. In sharp contrast to the court below, they all share the essential premise of the D.C. Circuit in *American Petroleum Institute v. EPA*, 216 F.3d 50, 57-58 (2000) that the "predominant purpose" in handling material determines whether it is "discarded" and therefore a RCRA "solid waste."

In *United States v. ILCO, Inc.*, 996 F.2d 1126 (1993), for instance, the Eleventh Circuit held that lead parts reclaimed from spent car and truck batteries for recycling purposes constituted "solid waste," notwithstanding their potentially significant economic value. The court rejected claims, analogous to those made by respondents and

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Idaho Farmers Ass'n, 96 P.3d 637 (Idaho 2004), petition for writ of certiorari pending No. 04-594), but they also underscore the wisdom of Congress's decision in Section 7002 to provide the public with protection in the face of hazards rising to the very high level of an "imminent and substantial endangerment."

upheld by the courts below, that the fact that the lead parts had potentially significant value necessarily took the secondary material involved outside RCRA's scope. The court instead ruled that "EPA has the authority to define materials destined for recycling as a subset of 'solid waste.'" *Id.* at 1131 n.8.

To similar effect was the D.C. Circuit's decision in *American Petroleum Institute v. EPA*, 906 F.2d 729 (1990). At issue in that case was the regulatory status of slag residue from the production of steel. It was undisputed that the slag residue was a valuable economic commodity based on its susceptibility to reclamation and the recovery of valuable metals. Yet, the D.C. Circuit ruled that the slag residue plainly fell within the statutory definition of "solid waste," actually rejecting a more narrow interpretation offered by EPA at the time. *Id.* at 740-742.[23]

In *Owen Electric Steel Co. of South Carolina v. Browner*, 37 F.3d 146 (4th Cir. 1994), the secondary material in dispute was once again slag material from steel production. On this occasion, the beneficial reuse was that the slag was being sold for use in roadbed construction. The Fourth Circuit, however, had no difficulty in concluding that EPA's regulations, which treated the slag as "hazardous waste," did not extend beyond the bounds of the same statutory definition of "solid waste" quite differently construed by the Ninth Circuit in this case. *Id.* at 149.

The Fifth Circuit decision in *United States v. Marine Shale Processors*, 81 F.3d 1361 (1996) is particularly relevant because it underscores the pitfalls of the Ninth Circuit's heavy reliance on the fact that the grass residue was capable of being burned as fuel. In *Marine Shale Processors*, the defendant claimed that contaminated soil was not a "waste" because the defendant was using it as a "product" in the form of a feedstock that was being burned. Presumably, the defendant in that case could have argued, like the court below held in this case, that one of the

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[23] In *American Mining Congress v. EPA*, 907 F.2d 1179, 1185 (D.C. Cir. 1990), the D.C. Circuit rejected the mining industry argument that secondary material generated by mining was not a "solid waste" because that material was "'beneficially reused in mineral processing operations.'" *Id., quoting* Final Brief of Consolidated Petitioners at 12.

benefits produced from the burning was getting rid of the contaminated soil. Not surprisingly, the Fifth Circuit had little difficulty rejecting the defendant's argument, ruling that the district court had erred in granting summary judgment to the defendant without first allowing the jury to consider factual allegations that the defendant's burning activity amounted to sham recycling. *Id.* at 1366.

Also in fundamental tension with the Ninth Circuit's sweeping rationale in its decision below is the Tenth Circuit's decision in *United States v. Self*, 2 F.3d 1071 (1993). In *Self*, the Tenth Circuit ultimately concluded that a particular reuse of a natural gas condensate did not amount to a "solid waste" under EPA's regulations more narrowly defining that term for the purpose of its hazardous waste program. The court of appeals, however, never questioned the validity of EPA's central position that "certain types of materials that are being recycled by being burned for energy recovery are considered solid wastes." *Id.* at 1077. The court agreed with EPA that the statutory definition of solid waste generally allows the Agency to regulate materials being recycled. *Id.* at 1077-79. The court also did not dispute that the burning of secondary materials generally amounts to a "discard." *Id.* The court parted ways with EPA only with regard to the Agency's interpretation of its own regulations as applied to a specific use of natural gas condensate. *Id.* at 1080-82.

2. This case would also be the right time for the Court to decide the legal issue presented. The Ninth Circuit's ruling is simply the most recent and extreme product of growing confusion in the lower courts concerning the status of recycled materials as "solid waste" under RCRA in general and Subchapter C in particular. Ever since 1987, when the D.C. Circuit handed down its ruling in *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987), both EPA and the lower courts have struggled to develop a coherent principle for distinguishing between recycled materials that fairly fall within the statutory definition of "solid waste" and those that do not. The D.C. Circuit's suggestion of a guiding principle purportedly based on a reading of the statute's plain meaning – which is little more than whether the waste materials are "part of the

waste disposal problem" (824 F.2d at 1186) - has proven largely circular and ultimately unhelpful. The resulting confusion has prompted EPA to make a series of missteps on either side of the D.C. Circuit's fairly illusory and panel-shifting dividing line.[24] It has also prompted the kind of extraordinarily misguided interpretation embraced by the Ninth Circuit in this case.

3. Finally, the existing circuit conflict is not one that should be tolerated. The conflict concerns the meaning of "solid waste," which is the central term defining the jurisdiction of RCRA, a national environmental program administered by EPA that is designed to protect human health and the environment. That jurisdiction should not be differently defined in different parts of the nation. As contemplated by Congress, the statute's scope as applied to both solid and hazardous wastes should be the same throughout the nation.

IV Review by this Court of the legal issue presented by this case is warranted now

Review is warranted because this case provides a good vehicle for resolution of an extremely important legal issue that divides the lower courts. There is no reason to await further litigation.

This case is an especially good vehicle because it presents the important legal issue as a pure question of law unencumbered by any procedural matters. The exclusive basis for the lower court's judgment was its interpretation of the threshold jurisdictional term "solid waste," as defined in RCRA Section 1004(27). The court did not dispute the validity of petitioner's claim that the

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[24] Compare American Mining Congress v. EPA, 907 F.2d at 1186 (the D.C. Circuit 1987 holding in *American Mining Congress v. EPA*, 824 F.2d at 1185 "concerned only materials that are 'destined for *immediate reuse* in another phase of the industry's ongoing production process'") with Association of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1052-1054 (D.C. Cir. 2000) (rejecting EPA's claim that the 1987 D.C. Circuit decision in *American Mining Congress* turned on the material being subject to "immediate reuse" in a temporal sense) and Safe Food & Fertilizer v. EPA, 350 F.3d 1263, 1268 (D.C. Cir. 2003) ("But we have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'").

open burning of the crop grass residue created an imminent and substantial endangerment to human health and the environment, including the deaths of several residents in the immediate vicinity of the burning activity.

The procedural posture of the case also presents the legal issue regarding the meaning of "solid waste" in an especially advantageous posture for this Court's review. The Ninth Circuit granted summary judgment in favor of respondents, which means the court was bound to consider any conflicting factual allegations of the parties in the light most favorable to the petitioner, as the non-moving party. See Board of Education v. Earls, 536 U.S. 822, 849 (2002). The court did not, for this reason, dispute that the almost exclusive purpose of the burning was to get rid of the crop residue because of the harm otherwise created by the presence of the residue on respondents' fields. See Pet. App. 14a & n.11; note 6, *supra*. Nor did the court question petitioner's evidentiary submission that any small amounts of nutrients remaining in the ash residue after the burning could be of little use to the soil. Pet. App. A15 n.12. This case, therefore, raises the fundamental question of the regulatory status of recycling activities under RCRA in an especially clear and stark fashion.

Both the regulated industry and the public, such as members of SAFE, whom Congress intended to be the ultimate beneficiaries of RCRA's protection, need this Court's attention to this question of law. The legal issue concerning the relationship of recycling to the plain meaning of "solid waste" under RCRA has now percolated in the lower courts for 18 years and the upshot has been more, rather than less, regulatory incoherence, and finally this untenable court of appeals ruling. SAFE's interests at stake in this case are also immediate and compelling. Respondents' burning of massive amounts of grass residue is causing serious and widespread adverse health effects, which are especially severe for children and the elderly. There have been repeated hospitalizations, emergency medical care, and even several deaths. This Court's review of this important legal issue is now warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.[25]

Respectfully submitted.

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February 2005

[25] Because of the implications of the lower court's decision for EPA's administration of RCRA, the Court might also invite the Solicitor General to file a brief expressing the views of the United States on the question presented either after granting the petition (see International Paper Co. v. Ouellette, 475 U.S. 1081 (1986)) or instead to assist the Court's decision whether to grant the petition in the first instance (see City of Chicago v. Environmental Defense Fund, 504 U.S. 906 (1992)).

United States Court of Appeals,
Ninth Circuit.

SAFE AIR FOR EVERYONE, Plaintiff-Appellant,
v.

WAYNE MEYER, et al., Defendants-Appellees

No. 02-35751.
Argued and Submitted Nov. 4, 2003.
Filed July 1, 2004.

Joel M. Gross, Arnold & Porter, Washington, D.C., for the plaintiff-appellant.

Gary H. Baise, Baise & Miller, Washington, D.C., for the defendants-appellees.

Jon M. Bauman, Elam & Burke P.A., Boise, ID, for amicus curiae American Lung Association of Idaho/Nevada.

Karl T. Klein, Givens Pursley LLP, Boise, ID, for amicus curiae Idaho Medical Association, Inc.

Appeal from the United States District Court for the District of Idaho; Edward J. Lodge, District Judge, Presiding. D.C. No. CV-02-00241-EJL.

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

GOULD, Circuit Judge:

We consider whether grass residue remaining after a Kentucky bluegrass harvest is "solid waste" within the meaning of the Resource Conservation and Recovery Act ("RCRA"). Safe Air for Everyone ("Safe Air") appeals the district court's dismissal of its complaint for injunctive relief under RCRA. We conclude that the district court erred in dismissing the

case on jurisdictional grounds. However, because we determine that Safe Air has failed to demonstrate that a genuine issue of material fact exists as to whether grass residue is "solid waste" under RCRA, we affirm the judgment of the district court.

I.

In Idaho, Kentucky bluegrass is typically planted in the spring but does not flower and produce seed until the summer of the following year. By the time the flowers have produced seed, the bluegrass plants are fifteen to thirty-six inches tall. To harvest bluegrass seed, farmers first cut the crop close to the ground to prepare the crop for combining (i.e., separating the seed from the crop). A "curing" process dries out and ripens the head of the crop. After the curing process is complete, a combine separates the seed from the straw, leaving the straw on the field. The seed is prepared for commercial distribution. However, straw and stubble (the part of the crop not cut from the ground) remain in the field. Bluegrass farmers burn these remnants, a practice called "open field burning" or "open burning." Bluegrass farmers can repeat this process for several years, depending on the length of the productive life of each bluegrass field.

Safe Air is a non-profit corporation formed by individuals from northern Idaho, Washington, and Montana. One of Safe Air's objectives is to stop the practice of open burning. Safe Air asserts that smoke resulting from open burning endangers the public because it contains high concentrations of pollutants that create severe respiratory problems for residents in areas immediately surrounding bluegrass farms. Defendants-Appellees ("the Growers") are a group of 75 individuals and corporations that plant and harvest Kentucky bluegrass seed commercially in Idaho. All of the

Growers engage in open burning in the process of growing Kentucky bluegrass.

Safe Air filed a complaint in the United States District Court for the District of Idaho on May 31, 2002, alleging that the Growers, by engaging in open burning, violated the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B).[1] Safe Air also sought a preliminary injunction enjoining the Growers from engaging in open burning. The Growers filed a response in opposition to Safe Air's motion for preliminary injunction, and also filed a motion to dismiss the complaint on the basis of lack of subject matter jurisdiction.

On July 10-12, 2002, the district court held an evidentiary hearing on Safe Air's request for preliminary injunction at which the testimony of twenty-three witnesses was given subject to cross examination. On July 19, 2002, the district court dismissed Safe Air's complaint, concluding that it was without jurisdiction to resolve Safe Air's RCRA claim because, *inter alia*, grass residue did not constitute "solid waste" under RCRA.[2]

Safe Air appeals. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

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[1] This provision permits an individual to file suit:

against ... any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B).

[2] The district court also dismissed Safe Air's federal common law nuisance claim. That claim is not presented to us on appeal.

II.

We first address the unusual procedural posture of the case. The Growers filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12. The district court construed the Growers' motion to dismiss as proceeding under Rules 12(b)(1) and 12(b)(6), and granted the Growers' motion under Rule 12(b)(1).

Safe Air argues that the district court erred in dismissing its complaint because: (1) the district court reviewed evidence outside the complaint (i.e., evidence from the preliminary injunction hearing) without converting the motion to dismiss into a summary judgment motion under Rule 56; and (2) the district court erroneously construed as a jurisdictional issue the question of whether grass residue (i.e., the straw and stubble that remain on the Growers' fields after the bluegrass harvest) is "solid waste" under RCRA. We disagree with Safe Air on the first issue because the district court, in this context, was not obligated formally to convert the Growers' motion into a motion for summary judgment solely because it reviewed evidence outside the complaint. However, as to the second issue, we agree that, in the circumstances of this case, the district court erred by treating the issue of whether grass residue is solid waste under RCRA as a jurisdictional issue.

The district court dismissed Safe Air's claim for lack of subject matter jurisdiction under Rule 12(b)(1). A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000) (citation omitted). In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. The Growers'

jurisdictional attack was factual because the Growers challenged Safe Air's contention that grass residue constitutes solid waste under RCRA. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n. 5 (11th Cir.2003) (jurisdictional challenge was a factual attack where it "relied on extrinsic evidence and did not assert lack of subject matter jurisdiction solely on the basis of the pleadings").

In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir.2003) (citing *White*, 227 F.3d at 1242). The court need not presume the truthfulness of the plaintiff's allegations. *White*, 227 F.3d at 1242. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage*, 343 F.3d at 1039 n. 2.

However, "[j]urisdictional dismissals in cases premised on federal-question jurisdiction are exceptional, and must satisfy the requirements specified in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)." *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 140 (9th Cir.1983). In *Bell*, the Supreme Court determined that jurisdictional dismissals are warranted "where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." 327 U.S. at 682-83, 66 S.Ct. 773.

We have held that a "[j]urisdictional finding of genuinely disputed facts is inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to

the merits' of an action." *Sun Valley*, 711 F.2d at 139 (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)).[3] The question of jurisdiction and the merits of an action are intertwined where "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Id. See also Thornhill Publ'g Co. v. Gen. Tel. Co.*, 594 F.2d 730, 734 (9th Cir.1979) ("[W]hen a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous.") (quotation omitted).

The district court erred in characterizing its dismissal of Safe Air's complaint under Rule 12(b)(1) because the jurisdictional issue and substantive issues in this case are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits. The Growers have not argued that Safe Air's federal claims are "immaterial," "made solely for the purpose of obtaining federal jurisdiction," or "wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682-83, 66 S.Ct. 773. Whether Safe Air alleged a claim that comes within RCRA's reach goes to the merits of Safe Air's action. *Sun Valley*, 711 F.2d at 140 ("[t]he ability of [the plaintiff] to allege a claim that comes within the definitional reach of the [Petroleum Marketing Practices Act] is a matter that goes to the merits of the action.").

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[3] Two of our sister circuits that have considered this issue are in accord. *See, e.g., Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir.2003) ("[w]e have cautioned, however, that the district court should only rely on Rule 12(b)(1) if the facts necessary to sustain jurisdiction *do not implicate the merits of plaintiff's cause of action.*") (internal quotation omitted); *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.1981) ("Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court ... is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.").

Safe Air filed its claim under the "citizen suit" provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), which permits suits:

> against any person ... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any *solid or hazardous waste* which may present an imminent and substantial endangerment to health or the environment.

(emphasis added). Because this provision of RCRA "provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief," the question of jurisdiction and the merits of this action are intertwined. For this reason, we hold that the district court's characterization of its dismissal under Rule 12(b)(1) was error. *Sun Valley*, 711 F.2d at 139.

III.

For the reasons expressed above, we review the district court's order below not as a dismissal for lack of subject matter jurisdiction but rather as a grant of summary judgment on the merits for the Growers. *Great W. Bank & Trust v. Kotz*, 532 F.2d 1252, 1254 (9th Cir.1976) (per curiam) (reviewing the district court's dismissal for lack of jurisdiction as a grant of summary judgment where the district court's dismissal was based on its conclusion that the note in question was not a "security" within the Securities Exchange Act).[4] Thus we

[4] Viewed in this light, we will review the ruling de novo. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003). Viewing the

review RCRA and its definition of "solid waste," interpretations of the statutory language in case law, and RCRA's legislative history to determine if Safe Air has demonstrated a genuine issue of material fact on the issue of whether grass residue is "solid waste" under RCRA.

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). "Congress' 'overriding concern' in enacting RCRA was to establish the framework for a national system to insure the safe management of hazardous waste." *Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177, 1179 (D.C.Cir.1987). Congress also expressed concern over "the 'rising tide' in scrap, discarded, and waste materials" and "the need to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." *Id.* (quoting 42 U.S.C. § 6901(a)(2) and (a)(4)).

Safe Air filed this lawsuit under the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B). To prevail, Safe Air must establish that the Growers are contributing to the "handling, storage, treatment, transportation, or disposal of any *solid or hazardous waste* which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Safe Air does not allege that the grass residue in question is "hazardous waste." Therefore, the crux of the case turns on the issue of whether Kentucky bluegrass residue is "solid waste" within the meaning of RCRA.

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evidence in the light most favorable to the nonmoving party, we determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Navajo Nation v. Norris*, 331 F.3d 1041, 1044 (9th Cir.2003). We do not weigh the evidence or determine the truth of the matter, but only determine whether a genuine issue of material fact exists for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir.1999) (en banc).

Faced with the duty to interpret this provision of RCRA, we follow established principles of statutory construction. "[C]anons of statutory construction help give meaning to a statute's words. We begin with the language of the statute." *The Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir.2003) (en banc) (internal citations omitted). "[A]nother fundamental canon of construction provides that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Id.* (internal quotation marks omitted). We have also recently reiterated the principle that, "in construing a statute, courts generally give words not defined in a statute their 'ordinary or natural meaning.' " *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir.2004) (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994)). With these maxims in mind, we turn again to RCRA.

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations...." 42 U.S.C. § 6903(27) (emphasis added). RCRA itself does not define the term "discarded material." However, we note that the verb "discard" is defined by dictionary and usage as to "cast aside; reject; abandon; give up." 1 The New Shorter Oxford English Dictionary 684 (4th ed.1993). We consider the term "discard" in its ordinary meaning to decide whether Safe Air presented a genuine issue of material fact supporting its contention that the Kentucky bluegrass residue burnt by the Growers is "solid waste" under RCRA.

Our sister circuits have considered the scope of RCRA's definition of "solid waste," and their determinations are helpful to our analysis. The D.C. Circuit assessed the scope of RCRA's definition of "solid

waste" in American Mining Congress v. U.S. EPA, 824 F.2d 1177 (D.C.Cir.1987) (*AMC I*). In *AMC I,* an industry group of mining and oil refining companies challenged an Environmental Protection Agency ("EPA") rule amendment giving the EPA authority to regulate reused materials in the petroleum and mining industries. Noting that "EPA's jurisdiction is limited to those materials that constitute 'solid waste,' " *AMC I,* 824 F.2d at 1179, the D.C. Circuit held that "our analysis of [RCRA] reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id.* at 1190. It reasoned, persuasively to us, that "[e]ncompassing materials retained for immediate reuse within the scope of 'discarded material' strains ... the everyday usage of that term."[5] *Id.* at 1184. Significant for our purposes, *AMC I* determined that materials have not contributed to a waste disposal problem where "*they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.*" *Id.* at 1186. The D.C. Circuit held that EPA contravened Congress's intent by attempting to regulate "in-process secondary materials." *Id.* at 1193.[6]

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[5] The Second Circuit took a consistent approach, though reaching a different result on the facts, in Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co., 989 F.2d 1305 (2d Cir.1993). In *Connecticut Coastal,* the materials at issue were 2400 tons of lead shot and eleven million pounds of clay target fragments located on land and waters surrounding a shooting club. The materials had accumulated after seventy years of operation of the shooting club. The court held, "[w]ithout deciding how long materials must accumulate before they become discarded ... we agree that the lead shot and clay targets in Long Island Sound have *accumulated long enough* to be considered solid waste." *Id.* at 1316 (emphasis added). Thus, the length of time the materials accumulated was important to determining whether the materials were solid waste.

[6] The D.C. Circuit revisited this issue in American Mining Cong. v. U.S. EPA, 907 F.2d 1179 (D.C.Cir.1990) (*AMC II*), when it held that sludge from wastewater that *may* at some time in the future be reclaimed constitutes "discarded" material under RCRA. *Id.* at 1186-87. The court determined that "[n]othing in [*AMC I*] prevents [EPA] from treating as 'discarded' the wastes at issue in this case, which are managed in land disposal units that *are* part of wastewater

The D.C. Circuit reached a similar conclusion in *Association of Battery Recyclers v. U.S. EPA*, 208 F.3d 1047 (D.C.Cir.2000). The issue in *Battery Recyclers* was whether materials generated and reclaimed within the mineral processing industry could be deemed "solid waste" under RCRA, such that it could be regulated by the EPA. The court held that "at least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." *Id.* at 1056.

The Eleventh Circuit addressed a variation of this issue in *United States v. ILCO*, 996 F.2d 1126 (11th Cir.1993). In *ILCO*, a lead smelting company ("Interstate Lead") producing ingots from lead plates of recycled automobile batteries challenged EPA's regulation of the plates.[7] Interstate Lead argued that, because it had never disposed of the lead plates, EPA could not regulate the lead plates as "discarded material" under 42 U.S.C. § 6903(27). The Eleventh Circuit disagreed, reasoning:

> The lead plates and groups are, no doubt, valuable feedstock for a smelting process. Nevertheless, EPA, with congressional authority, promulgated regulations that classify these materials as 'discarded solid waste.' *Somebody* has discarded the battery in which these components are found. This fact does not change just because a reclaimer has purchased or finds value in the components.

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treatment systems, which *have* therefore become 'part of the waste disposal problem,' and which are *not* part of ongoing industrial processes." *Id.* at 1186.

[7] EPA regulated these materials under RCRA's "hazardous waste" subsection; however, as we have already discussed, hazardous waste under RCRA is a subset of "solid waste," and the definition of "solid waste" at issue in *ILCO* was the same as that before us.

Id. at 1131.[8]

Considering these extra-circuit cases to be persuasive in identifying relevant considerations bearing on whether grass residue is "solid waste" under RCRA, we will also evaluate: (1) whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," *AMC I*, 824 F.2d at 1186; (2) whether the materials are being actively reused, or whether they merely have the *potential* of being reused, *AMC II*, 907 F.2d at 1186; (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer, *ILCO*, 996 F.2d at 1131.

We turn to the evidence submitted by the parties to the district court. The Growers presented evidence that they do not discard the grass residue, but rather reuse grass residue in a continuous process of growing Kentucky bluegrass. This reuse generates two primary benefits to the Growers: returning nutrients to bluegrass fields and facilitating the open burning process.

The Growers presented evidence at the preliminary injunction hearing showing that grass residue contains nutrients that are beneficial to bluegrass fields when returned to soil. Dr. Glen Murray, the Growers' expert on growing Kentucky blue-grass in the northern Idaho area, testified that grass residue contributes recycled nutrients and can act as a fertilizer to bluegrass fields. Karl Felgenhauer, a Washington bluegrass farmer, also testified that grass residue

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[8] We recognize that the issue of monetary value does not affect the analysis of whether materials are "solid waste" under RCRA. As the Eleventh Circuit held in *ILCO*, the fact that discarded materials are "solid waste" under RCRA does not change "just because a reclaimer has purchased or finds value in the components." *Interstate Lead*, 996 F.2d at 1131. However, in this case the Growers do not base their argument on the assertion that grass residue has monetary value to *someone;* rather, the Growers argue that grass residue is not solid waste because they immediately reuse it to further successful bluegrass harvests.

contains such nutrients. Paul Stearns, another Washington bluegrass farmer, testified that grass residue remaining after a bluegrass harvest contains potash and can act as a fertilizer.

The Growers also presented evidence that grass residue is an integral component in the open burning process because grass residue carries fire efficiently across bluegrass fields. The grass residue's vital role in the open burning process is significant because the Growers submitted evidence establishing that open burning has four critical benefits for Kentucky bluegrass farmers.

First, several witnesses testified that open burning extends the productive life of bluegrass fields. Donald Jacklin, Safe Air's witness, testified that open burning in some cases increases the life of bluegrass fields up to twenty years. Asked about the value of open burning to bluegrass production, Jacklin testified that "nothing equals burning," and that open burning is an agricultural practice incorporated into the production, planting, and harvesting of bluegrass. Dr. Murray testified that a bluegrass field's seed production can be maintained longer with open burning. Felgenhauer, the Washington farmer, testified that he experienced a significant decrease in the life of his bluegrass fields after an open burning ban was instituted in Washington state.

Second, several witnesses testified that open burning restores beneficial minerals and fertilizers to bluegrass fields. Dr. Paul Meints, one of Safe Air's experts, testified that the value of burnt grass residue ash to bluegrass fields is "[p]rimarily the restoration of the phosphorus and potassium that is held within that tissue," and that burnt grass residue ash left on soil is beneficial to bluegrass fields because it provides nutrients. Defendant Wayne Meyer, an Idaho bluegrass farmer, testified that phosphorus and potash remain on bluegrass fields as a result of the burning process, and

that these elements act as a fertilizer to the fields. Stearns testified that farmers who engage in open burning need to purchase less supplemental potash because open burning releases potash onto the bluegrass field. Dr. Murray testified that nutrients are left in the ash of burnt residue.

Third, the Growers presented evidence suggesting that open field burning reduces or eliminates insects on bluegrass fields, reducing the need for pesticide use.[9] Schultheis testified that he had to use more pesticides, herbicides, and fungicides on his fields after he stopped open burning, and that open burning also reduces wheat infestation.[10] Meyer also testified that open burning controls weeds, insects, and disease.

Finally, Paul Stearns testified that open burning blackens the soil on bluegrass fields, which maximizes the soil's sunlight absorption to increase the crop yield for the following crop. Dr. Meints also testified that blackened soil absorbs heat and sun rays.

Safe Air does not contest that grass residue provides benefits for the Growers, but argues that the primary benefit to the Growers from open burning is removal of grass residue, and that other benefits of grass residue are incidental to the Growers' goal of removing the residue. Safe Air argues that the two most important benefits from open burning of grass residue, sunlight absorption and enhancing productive life of bluegrass fields, result from the removal of grass residue.[11] As to

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[9] The Idaho legislature has made a similar finding that "the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations." Idaho Code § 22-4801.

[10] Wheat infestation tends to reduce the quality of a bluegrass harvest.

[11] Safe Air, for example, presented testimony of Jacklin, a bluegrass farmer, that "99.9%" of the reason why he engaged in burning was for the "photo induction enhancement" of seed yield, which he characterized as maximizing the sunlight exposure of new bluegrass plant tissue.

the other benefits (i.e., the fertilizer in the ash and reduced pesticide use), Safe Air argues that these are "incidental benefits that do not change the nature of what is transpiring from the discarding of waste."[12]

However, even when we view the evidence in the light most favorable to Safe Air, there is no dispute that the Growers realize farming benefits from reusing grass residue in the process of open burning. Safe Air did not present testimony challenging the Growers' contentions that: (1) grass residue offers nutrients to bluegrass fields; (2) burnt grass residue ash resulting from open burning helps fertilize bluegrass fields; (3) open burning reduces the incidence of weed, fungi, and insect infestation in bluegrass fields; and (4) open burning blackens bluegrass fields, which contributes to creating optimal conditions for the next bluegrass harvest. Safe Air dismisses these indisputable benefits as "incidental," but our view is necessarily controlled by RCRA's statutory language suggesting that materials must be "discarded" to be considered solid waste. Because there is undisputed evidence that the Growers reuse the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass, there is no genuine issue of material fact as to whether grass residue is "discarded material." It is not. The bluegrass residue is not discarded, abandoned, or given up, and it does not qualify as "solid waste" under RCRA, based on its statutory definition of "solid waste" as "discarded material."

Moreover, our evaluation of each of the factors noted by our sister circuits in analogous cases, discussed above, supports that grass residue beneficially reused by the Growers in producing Kentucky bluegrass is not

[12] For example, Dr. Meints testified that open burning does not "necessarily" reduce the need for use of pesticides, herbicides, and fungicides, although he conceded that he did not submit evidence in the record to support that conclusion. Dr. Meints also testified that much organic matter is burned during the open burning process, and that any organic matter that remains after open burning provides little benefit to soil.

"solid waste" under RCRA. The Growers presented uncontroverted evidence establishing that: (1) the grass residue is destined for beneficial reuse in a continuous process of growing and harvesting Kentucky bluegrass seeds, the generating industry, AMC I, 824 F.2d at 1186; (2) the Growers reuse grass residue, *inter alia*, to provide nutrients and to act as a fire accelerant for open burning, as opposed to being kept in storage for potential reuse, AMC II, 907 F.2d at 1186; and (3) the grass residue is being reused by farmers who are its original owners (the Growers), not by a salvager or reclaimer. ILCO, 996 F.2d at 1131. Under these standards, which we determine to have persuasive application here, there is no genuine issue of material fact as to whether grass residue is "discarded."

RCRA's legislative history also reinforces our conclusion that grass residue is not the type of material that Congress intended to proscribe under RCRA. The House Report reveals that RCRA was intended as "a multi-faceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8% annual increase in the volume of such waste." H.R.Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239. Congress was concerned with waste products of all types that were contributing to ever-increasing landfills:

> In addressing this problem, the Committee recognizes that Solid Waste, the traditional term for trash or refuse is inappropriate. The words solid waste are laden with false connotations. They are more narrow in meaning than the Committee's concern. The words discarded materials more accurately reflect the Committee's interest.

Not only solid wastes, but also liquid and contained gaseous wastes, semi-solid wastes and

sludges are the subjects of this legislation. Waste itself is a misleading word in the context of the committee's activity.... An increase in reclamation and reuse practices is a major objective of the Resource Conservation and Recovery Act.

Id. at 2-3, *reprinted in* 1976 U.S.C.C.A.N. at 6239-41.

In enacting RCRA, Congress also declared that agricultural products that could be recycled or reused as fertilizers were *not* its concern. The same House Report stated, "[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses.... Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." *Id.* at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6239-41.

The burning of bluegrass residue by farmers is not the evil against which Congress took aim. To the contrary, the bluegrass residue is the type of agricultural remnant, used by farmers to add nutrients to soil, that Congress did not consider to be "discarded." H.R.Rep. No. 94-1491, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6239-41 ("[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses.... Agricultural wastes which are returned to the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation.").

Safe Air's response to RCRA's legislative history is unpersuasive. Safe Air argues that because the House Report states that "*much* industrial and agricultural waste is reclaimed," "much" does not mean "all," and this leaves open the possibility that grass residue is solid waste. However, the possibility of such a distinction in theory does not persuade us that there is a genuine issue

of material fact as to whether blue-grass residue can properly be considered "solid waste" within RCRA's meaning.[13]

Given the uncontroverted evidence that the Growers reuse the grass residue in a continuous process for Kentucky bluegrass production, and do so in accord with farming practices that are beneficial in increasing crop yields, Safe Air has not demonstrated a genuine issue of material fact on the issue whether grass residue is a "solid waste" under RCRA.[14]

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[13] Referring to the House Report's comment that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation," Safe Air argues that "[i]f the Growers mulched their residue and returned it to the soil, this sentence might have applicability. But that is not what they do. They burn the residue...." This argument has some weight but is not dispositive. It is true that a part of the residue is returned to soil while a part that is smoke is carried off by air. Yet, for materials to be solid waste under RCRA, they must be "discarded." The determination of whether grass residue has been "discarded" is made independently of *how* the materials are handled. Despite the fact that a portion of residue becomes airborne smoke, the residue is not thereby automatically "discarded."

[14] The dissent makes four arguments to which we respond briefly.

First, the dissent argues that grass residue is "discarded material" under a dictionary definition and maintains that is dispositive. In our textual discussion we noted the dictionary meaning of "discard" as "cast aside; reject; abandon; give up," and we have fairly applied this definition. As we explain in our analysis, we conclude that grass residue is not "solid waste" under RCRA. Thus, while both this opinion and the dissent agree that we start with the statute's language, in our view the dissent goes astray with an incomplete analysis.

Second, the dissent contends that the out-of-circuit cases that we cite are inapplicable because they involve EPA regulations that have a narrower definition of "solid waste." This argument is without merit. Because these cases involve challenges to EPA's regulation of particular items, these cases necessarily address whether those items were within RCRA's statutory definition of "solid waste" as "discarded material," the same definition at issue here. *ILCO*, 996 F.2d at 1132 (rejecting challenge to EPA regulation because batteries were "discarded" under RCRA's general definition

We discern from Congress's explicit language in RCRA, focusing on discarded materials as a touchstone for solid waste, and from Congress's stated purposes, no Congressional declaration or intent to prohibit the established farming practice of open burning of Kentucky bluegrass residue. The benefits to the Growers of this practice were established beyond dispute in the evidence presented to the district court. Safe Air has not demonstrated that there is a genuine issue of material fact as to whether grass residue is "solid waste" under RCRA.[15] On the undisputed evidence, we conclude that Kentucky bluegrass residue is not a "solid waste," and that RCRA does not prohibit the Growers' general practice of open burning.[16]

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of "solid waste"); *AMC I*, 824 F.2d at 1185 ("The question we face ... is whether ... Congress was using the term 'discarded' in its ordinary sense...."); *AMC II*, 907 F.2d at 1186 ("Nothing in *AMC* prevents [EPA] from treating as 'discarded' the wastes at issue in this case...."). These cases analyze the term "discarded," are persuasively contrary to the dissent's analysis, and are relevant to the issue before us which has never been decided by our circuit.

Third, the dissent argues that our holding permits any disposal process as long as the waste residue is eventually returned to soil. This is an incorrect overstatement. We only hold that, in these circumstances of Kentucky bluegrass farming, grass residue customarily used in the farming cycle is not "solid waste" under RCRA.

Finally, the dissent urges that a genuine issue of material fact exists as to the value of grass residue to the Growers. But as we explain in our textual discussion, the Growers introduced uncontested testimony, during an extensive evidentiary hearing in the district court, that grass residue has benefits to the Growers. The dissent does not point to any testimony contradicting this point that the district court found uncontested. It is not enough for Safe Air merely to argue that the uncontested benefits are ancillary.

[15] Having determined that grass residue is not "solid waste" under RCRA, we need not address whether the Growers' handling of the grass residue constitutes a "disposal," "treatment," or "handling" of solid waste. Nor do we address whether the Growers' practice of open burning constitutes an "imminent and substantial endangerment" under RCRA.

[16] Of course, any burning of bluegrass residue must comply with both the federal Clean Air Act, 42 U.S.C. § 7470 et seq., and with any applicable state regulation. As pertinent here, the lawsuit

AFFIRMED.

PAEZ, Circuit Judge, concurring in part, dissenting in part:

I concur in Part II of the majority opinion, in which the majority concluded that we should review the district court's dismissal for lack of jurisdiction as a grant of summary judgment on the merits for the Growers. I respectfully dissent, however, from Part III, which holds that Safe Air has not demonstrated that the post-harvest crop residue is a "solid waste" under RCRA. Because I disagree with the legal standard that the majority applies to determine whether the post-harvest crop residue has been "discarded," I would conclude instead that the Growers have discarded the post-harvest crop residue within the meaning of RCRA. Even if I were to agree with the majority's interpretation of the RCRA statute, I would nonetheless hold that there are genuine triable issues of fact. Accordingly, I would reverse the district court's judgment and remand for trial.

I.

Because RCRA does not define "discarded" we look to the "ordinary, contemporary, common meaning"

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before us on appeal makes no claim under the Clean Air Act, and the record, so far as it addresses this issue, suggests that the Growers have complied with air quality standards set by federal and state regulators charged with enforcement of the Clean Air Act. In addition, Idaho has not outlawed generally the practice of burning Kentucky bluegrass residue, and the Growers' conduct is not alleged to violate Idaho state regulation of open burning as it affects air quality. *See generally* Idaho Code § 22-4801 (Michie 1995 & Supp.2002).

of that term.[1] *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir.2003) (en banc) (internal quotation marks omitted). Thus, our ultimate task is to determine whether Safe Air has presented evidence that, if accepted as true, creates a genuine issue concerning whether the Growers have "drop [ped], dismiss[ed], let go, or g[o]t rid of as no longer useful, valuable or pleasurable" the post-harvest crop residue. *Webster's Third New International Dictionary* 644 (1993).

Considering the evidence presented to the district court, I have little difficulty concluding that Safe Air has presented sufficient evidence to show that the post-harvest crop residue was "discarded." In opposition to the Growers' motion to dismiss and in support of its motion for preliminary injunction, Safe Air presented the district court with testimony and affidavits from its members, individuals in the community and medical and agricultural experts. In this testimonial and documentary evidence, Safe Air established that it is necessary to remove the post-harvest residue in order to maintain seed yields. Indeed, Safe Air contended that "the primary purpose of burning the fields is to *remove* the excess post-harvest crop residue from the bluegrass fields."

In their motion to dismiss, the Growers did not dispute Safe Air's assertion that the post-harvest crop residue had to be removed from the fields. Although the Growers presented testimony and affidavits contending that they did not intend to discard the residue, they nonetheless admitted that the residue had to be removed from the fields in order to maintain seed production and to limit the insects and parasites that would otherwise find food and shelter in the residue.[2]

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[1] As the majority recognizes, the question of whether the post-harvest crop residue constitutes "solid waste" under RCRA depends on the meaning of "otherwise discarded material." Thus, I primarily focus here on the definition of "discarded material."

[2] For example, Dr. Murray, an expert testifying on behalf of the Growers, admitted during his testimony at the preliminary injunction hearing that "the primary reason that Kentucky bluegrass

Because there is no dispute that the Growers burn the post-harvest crop residue to remove it from the fields, and because this act of removal is within the plain meaning of "discard," I would reverse the district court's judgment and remand for further proceedings.[3]

II.

It is well-established that "[w]here the plain meaning of a provision is unambiguous that meaning is controlling, except in the rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters." *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir.1997) (internal quotation marks omitted). *See also United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) ("If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' ") (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). The majority's analysis, however, extends beyond the plain meaning of "discard" to evaluate those "relevant considerations," Maj. Op. at 1043, that it has gleaned from extra-circuit cases discussing the meaning of "discard" in distinctly different contexts. Because I do

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farmers use fire is to remove the residue from the field." Similarly, Mr. Jacklin, a bluegrass farmer testifying on behalf of Safe Air, noted that "99.9 percent" of the reason for burning the fields is to remove the post-harvest crop residue to ensure that the light needed for bluegrass seed production could reach the bluegrass plants.

[3] Although there is no dispute that the post-harvest crop residue has been discarded, I would not hold that Safe Air is entitled to summary judgment in its favor because Safe Air must also prove that the Growers' burning constitutes an "imminent and substantial endangerment to the public health." 42 U.S.C. § 7002 et seq. The district court did not address this issue and it should do so in the first instance.

not believe that there is any need to look beyond the ordinary meaning of the term "discard" and the majority has not offered any convincing rationale for its extended analysis, I would only look to the ordinary meaning of "discard," and would conclude, as explained above, that the Growers discard the post-harvest crop residue.

Even if the majority could justify importing "relevant considerations" in determining the meaning of "discard," I would nonetheless reverse the district court's judgment in this case. I disagree that the extra-circuit cases--or indeed, the statute itself--support the majority's conclusion that mere beneficial reuse means that a substance has not been discarded under RCRA. Moreover, even were I to accept the majority's interpretation, I would conclude that a genuine issue of material fact exists as to whether the post-harvest crop residue is "destined for beneficial reuse in a continual process." Maj. Op. at 1045.

A.

The majority cites to RCRA's legislative history to support its conclusion that RCRA does not encompass the post-harvest residue at issue here. Because the plain and unambiguous definition of "discard" encompasses the post-harvest crop residue, the legislative history should be examined only to determine whether there is a "clearly expressed ... contrary legislative intent." *United States v. Fiorillo*, 186 F.3d 1136, 1146 (9th Cir.1999) (quotation marks omitted) (analyzing statutory provision of RCRA).

Far from revealing a "contrary" intent, the legislative history demonstrates that Congress intended solid waste to include "*any* ... discarded material resulting from ... agricultural operations...." 42 U.S.C. § 6903(27) (emphasis added).[4] The House Report indicates

[4] Indeed, where, as here, the statute is a remedial statute, enacted to protect the public health, we are most likely to satisfy

that Congress purposefully defined "solid waste" to include "discarded materials" to give RCRA a broader reach. *See* H.R.Rep. No. 94-1491, pt. I, at 2, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240, 6246.[5]

The majority makes much of the fact that the House Report excludes "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners...." H.R.Rep. No. 94-1491, pt. I, at 2, *reprinted in* 1976 U.S.C.C.A.N. at 6239; *but see* 40 C.F.R. § 261.4(b)(2) (indicating that residue from the "growing and harvesting of agricultural crops" which "are returned to the soils as fertilizers" are "[s]olid wastes which are not hazardous wastes."). But this statement does not indicate that Congress intended to exclude from the scope of RCRA agricultural waste that is first burned before being used as fertilizer.[6] According to the majority's logic, any disposal process, no matter how

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Congress's purposes by construing the statute broadly. *See e.g., Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1481 (9th Cir.1995) (noting that the Comprehensive Environmental Response, Compensation and Liability Act was enacted to protect public health and, should thus be construed broadly); *United States v. Aceto Agr. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir.1989) (recognizing that RCRA is a remedial statute that should be construed liberally).

[5] When RCRA was enacted, agricultural waste was the second largest source of waste in this country, producing 687 million tons per year. *See* H.R.Rep. No. 94-1491, pt. I, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6252-53. Congress enacted RCRA to regulate disposal methods, including burning, that created health and safety risks. *See id.* at 37-38, 90, *reprinted in* 1976 U.S.C.C.A.N. at 6275-77, 6325-26. Construing "solid waste" to include the post-harvest crop residue at issue here furthers Congress's intent to regulate the disposal of waste that could endanger public health.

[6] Although the majority states that "the determination of whether [the post-harvest crop] residue has been 'discarded' is made independently of *how* the materials are handled," the majority ignores the fact that the question of whether the post-harvest crop residue is "solid waste" is inextricable from the question of how those materials are handled. *See* 42 U.S.C. § 6903(27). Thus, the fact that the residue is burned, rather than mulched and returned to the soil, is relevant to whether the residue constitutes "solid waste" under RCRA.

environmentally unsound, would be exempted from the reach of RCRA as long as the waste residue was eventually returned to the soil. This could not have been Congress' intent, especially since Congress expressed a special concern with waste that was burned. *See* H.R.Rep. No. 94-1491, pt. I, at 37-38, 90, *reprinted in* 1976 U.S.C.C.A.N. at 6275-77, 6325-26; *see also id.* at 17-24, *reprinted in* 1976 U.S.C.C.A.N. at 6254-62 (listing improper disposal practices that resulted in harmful air pollution). *Cf. Am. Mining Cong. v. U.S. EPA*, 907 F.2d 1179, 1187 (D.C.Cir.1990) (*AMC II*) (concluding that, where the disposal or treatment process posed a danger to the public health, the material disposed of should be considered "discarded").

No statutory declaration or other Congressional statement of intent suggests that post-harvest residue that is burned should be excluded from RCRA's definition of "solid waste." Rather, the House Report reflects that RCRA specifically applies to disposal practices that result in air pollution:

> The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. At present the federal government is spending billions of dollars to remove pollutatns [sic] from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

H.R.Rep. No. 94-1491, Part I, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6241-42. Where, as here, the

residue is discarded and burned, the legislative history indicates that the disposal of such material is within the meaning of "solid waste" under RCRA.

B.

The majority also relies on extra-circuit cases to support its conclusion that the post-harvest crop residue is not "discarded." These cases, however, are inapplicable to the interpretation of "solid waste" at issue here. Most notably, those cases interpret the meaning of "solid waste" in considering the validity of hazardous waste regulations promulgated by the Environmental Protection Agency ("EPA").[7] *See* AMC I, 824 F.2d at 1178 (considering whether the EPA exceeded its regulatory authority by including "in process secondary materials" in its definition of solid waste); *American Mining Cong. v. U.S. EPA*, 907 F.2d 1179, 1181-82 (D.C.Cir.1990) (*AMC II*) (considering whether the EPA exceeded its regulatory authority in treating six wastes generated from metal smelting operations as "hazardous" waste); *United States v. ILCO, Inc.*, 996 F.2d 1126, 1130 (11th Cir.1993) (considering whether "lead parts, which have been reclaimed from spent car and truck batteries for recycling purposes, are exempt from[the EPA's] regulation under RCRA").

Although RCRA defines "solid waste" to cover all types of "discarded materials," *see* 42 U.S.C. § 6903(27), the EPA's RCRA regulations at issue in *AMC I, AMC II* and *ILCO* have a special definition of "solid waste," *see*

[7] Under RCRA, a "solid" waste is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material...." 42 U.S.C. § 6903(27). A "hazardous" waste, however, is a subset of "solid" waste which may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5).

40 C.F.R. § 261.2(a)(1), which "applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA." 40 C.F.R. § 261.1(b)(1).[8] Thus, the regulatory definition considered in *AMC I*, *AMC II* and *ILCO* is significantly narrower than the statutory definition at issue here. Accordingly, I do not find these cases persuasive in our determination of whether the post-harvest crop residue has been "discarded."

C.

Even if I were to agree with the majority's conclusion that the extra-circuit cases constitute persuasive authority, Maj. Op. at 1043, I would nonetheless conclude that there is a genuine factual dispute as to whether the post-harvest crop residue has been discarded. I would therefore reverse the summary judgment in favor of the Growers.

Relying on the analysis in *AMC I*, *AMC II* and *ILCO*, the majority reasons that as long as the residue "provides benefits for the Growers," Maj. Op. at 1044, it has not been "discarded" under RCRA. This unnecessarily narrows the definition of "discarded material."

The cases do not support the majority's proposition that the mere recognition of some beneficial use negates the fact that materials have been "discarded" under RCRA. The cases cited by the majority distinguish between those materials extracted and immediately reused in an ongoing process and those materials discarded and only later put to beneficial use. *AMC I*

[8] Subtitle C of RCRA, 42 U.S.C. § § 6921-6939, requires the EPA to create a comprehensive regulatory scheme for the treatment, storage and disposal of hazardous wastes. Under this section, the EPA must "develop and promulgate criteria for identifying the characteristics of [those] 'solid' wastes that are also 'hazardous' wastes." 42 U.S.C. § 6921(a), (b).

merely held that materials extracted from primary metals that are recaptured and recycled as part of an ongoing industrial process are not "solid waste" under the EPA's regulatory definition of that term. That same court later clarified that *AMC I* 's "holding concerned only materials that are 'destined for *immediate reuse* in another phase of the industry's ongoing production process....' " *AMC II*, 907 F.2d at 1186 (quoting *AMC I*, 824 F.2d at 1185) (emphasis in original). The D.C. Circuit also rejected the claim that "potential reuse of a material prevents the [EPA] from classifying it as 'discarded.' " *Id.; see also ILCO*, 996 F.2d at 1132 (noting that "[p]reviously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste"); *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 741 (D.C.Cir.1990) (holding that slag residue resulting from the production of steel was "discarded" even though zinc would later be recovered from the slag at a reclamation facility.).

Thus, even following the majority's analysis and drawing on the principles from the above cases, it still must be shown that the residue is "destined for *immediate reuse* in another phase of the industry's ongoing production process." *AMC II*, 907 F.2d at 1186 (emphasis in original). Relevant considerations may include such questions as the intent of the Growers in using the materials and the purpose of removing the residue, *see No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148 (2d Cir.2001) (insecticides are not "discarded" within the meaning of RCRA when they are sprayed into the air with the design of effecting their intended purpose of killing mosquitoes and their larvae); *Water Keeper Alliance v. United States Dep't of Defense*, 152 F.Supp.2d 163, 167-69 (D.P.R.) (holding that ordinances were not "discarded material" under RCRA as soon as they made contact with the land because, at that moment, at least, they were still serving their intended purpose), *aff'd* 271 F.3d 21 (1st Cir.2001); and the specific mechanics of the process, including, for example, the length of time the post-harvest crop

residue was left on the fields before the Growers burned it, *see* Conn. Coastal Fishermen's Ass'n. v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir.1993) (lead and clay shots were discarded because they had been "left to accumulate long after they[had] served their intended purpose").

Safe Air contends that the Growers' primary purpose in burning the residue is to remove it--that is, "burning blue-grass residue is primarily an inexpensive waste disposal practice." On the other hand, the Growers argue that they consider the post-harvest crop residue "important and valuable materials used in the agricultural process." There are thus decidedly different accounts of whether and how the post-harvest crop residue factors into the continuing growth process for Kentucky bluegrass.[9] Even if I were to agree with the

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[9] The majority notes that Safe Air does not dispute that the post-harvest crop residue provides some benefits to the Growers. But, under the majority's approach, this is not the question that must be resolved in determining whether the residue has been "discarded." Rather, the key inquiry is whether the Growers reuse the post-harvest crop residue in a continuous process of producing seed. Although the majority states that the Growers produced "uncontroverted evidence that [they] reuse the [post-harvest crop] residue in a continuous process," Maj. Op. at 1046, Safe Air in fact vigorously contested this assertion. For example, Dr. Meints, an expert for Safe Air, submitted a declaration stating that fire is *not* necessary to produce bluegrass seed:

> The primary purpose of burning bluegrass straw is to remove the excess post-harvest crop residue from bluegrass fields. Fire is not necessary to physiologically shock or stimulate bluegrass to produce seed or increase seed yield. Fire is an inexpensive way for the [G]rowers to remove post-harvest crop residue from the field and remove grass straw from the crown of the plant.... Farmers in Washington [for example] have successfully grown and harvested bluegrass seed on tens of thousands of acres without open field burning.

Similarly, Art Krenzel, another expert for Safe Air, submitted a declaration explaining that fire is not necessary to produce bluegrass seed:

> For years, it was an unchallenged tenet in the Kentucky bluegrass industry that fire is necessary to physiologically shock or stimulate the bluegrass plant to produce seed or maintain seed

majority's approach, I would reverse the district court's judgment in favor of the Growers because there exists a genuine dispute as to material facts. *See, e.g.*, *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003) (noting that summary judgment is not proper if there is a genuine dispute as to any material fact).

III.

Because I would remand for further proceedings, I briefly address the question the majority has not decided: whether the burning of the post-harvest crop residue constitutes "the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...." 42 U.S.C. § 6972(a)(1)(B).

"Disposal" is defined in RCRA to include the "deposit ... or placing of solid waste ... into or on any land ... so that such solid waste ... or any constituent thereof may enter the environment or be emitted into the air...." 42 U.S.C. § 6903(3) (1995). Here, the burning of the post-harvest crop residue clearly results in smoke and emits particles into the air, and such emissions only occur as a result of the Growers' actions--that is, by setting fire to the fields. Thus, I would hold that the burning of the post-harvest crop residue constitutes "disposal" of that waste under RCRA.

In the alternative, I also would hold that burning the fields to remove the post-harvest crop residue constitutes "treatment" or "handling" of solid waste

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yields. Both [u]niversity and private research in Kentucky bluegrass seed production have soundly proved this concept is incorrect, repeatedly.... Bluegrass farmers use fire to remove the grass straw because it is a cheap way to dispose of unwanted bluegrass crop residue so that the plants will receive sufficient sunlight, moisture, and space to produce a good seed crop the following year.

under § 6972(a)(1)(B). RCRA does not define "treatment" or "handling" in the context of solid waste, and thus, once again, I look to the ordinary meaning of these terms.[10] *See Wilderness Soc'y*, 353 F.3d at 1060. The ordinary meaning of "treatment" is "the action or manner of treating;" "treat" is further defined as "to handle, manage, or otherwise deal with ... to subject to some action (as of a chemical reagent) ... to subject (as a natural or manufactured article) to some process to improve the appearance, taste usefulness, or some other quality." *Webster's Third New International Dictionary* 2434-5 (1993). Thus, even if the Growers burned the waste solely to improve its usefulness--such as converting it into fertilizer--their actions would still constitute "treatment" of that waste.

Similarly, the burning of the post-harvest crop residue constitutes "handling" of that waste. The ordinary meaning of "handle" is: "to deal with; act upon; dispose of; perform some function with regard to." *Id.* at 1027. Again, the Growers' burning of the post-harvest crop residue fits within this definition.

The definitions of these terms--"solid waste," "disposal," "treatment," and "handling"--together with the undisputed facts regarding the need to remove the post-harvest crop residue, make it apparent that RCRA applies to the burning of the post-harvest crop residue. Accordingly, I would hold that the Growers' practice of burning the post-harvest crop residue after the bluegrass harvest constitutes "handling" or "treatment" of "solid waste" within the meaning of § 6972(a)(1)(B). For all the reasons above, I would reverse the district court's judgment in favor of the Growers and remand for trial.

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[10] RCRA does define "treatment" in the context of 42 U.S.C. § 6928(d)(2)(A), which refers specifically to the "treatment, storage or disposal of" hazardous waste: "The term 'treatment' ... means any method ... designed to change ... the character or composition of any hazardous waste ... so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume." 42 U.S.C. § 6903(34).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SAFE AIR FOR EVERYONE

v.

WAYNE MEYER, et al.,

Case No. CV-02-241-N-EJL

ORDER

Pending before the Court in the above-entitled matter is the Plaintiffs' motion for preliminary injunction.[1] Plaintiffs seek an injunction restricting the Defendants' from burning residue on their fields during the upcoming "burn season."[2] Plaintiffs' complaint also raises a federal nuisance claim. Defendants opposed the motion on several grounds and have filed a motion to dismiss, which is also pending before the Court.

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[1] The Plaintiffs are an organized group of approximately 1,000 citizens in northern Idaho, Washington, and Montana collectively known as Safe Air For Everyone (hereinafter "SAFE").

[2] The Defendants are a group of seventy-five named individuals who raise Kentucky Bluegrass on the Rathdrum Prairie and/or the Coeur d'Alene Tribal Reservation; both areas in northern Idaho. Applicable to the motion for preliminary injunction are forty-seven of these Defendants who have been titled "Class A" Defendants.

Defendants' motion to dismiss asserts the Plaintiffs have failed to state a cause of action upon which relief can be granted and that this Court lacks subject matter jurisdiction over the Plaintiffs' nuisance claim. The matter has been fully briefed and heard by the Court and is now ripe for consideration.

Applicable Standards

The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Dollar Rent a Car v. Travelers Indem., 774 F.2d 1371, 1374 (9th Cir. 1985) (citation omitted). More recently, the Ninth Circuit has developed an alternative test for granting a preliminary injunction which requires the court to balance the movant's likelihood of success on the merits against the relative hardship to the parties. See Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999); Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1118 (9th Cir. 1999). Thus, in this circuit a party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of the hardships tips in its favor. Textile Unlimited, Inc. v. BMH Co., Inc., 240 F.3d 781 (9th Cir. 2001); see also Tillamook County v. United States Army Corps of Engineers, 288 F.3d 1140, 1142 (9th Cir. 2002). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. Id. Regardless of the criteria employed, whenever the public interest is involved, it must be a necessary factor in the Court's consideration of whether to grant preliminary injunctive relief. Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

A motion to dismiss should he granted where the plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12. "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Van Buskirk v. Cable News Network, Inc., 284 F.3d 977 (9th Cir. 2002) (citing Raban v. INS, 35 F.3d 1449, 1451 (9th Cir. 1994) (citing Buckey v. County of Los Angeles, 968 F.2d 791, 793-94 (9th Cir. 1992)). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." American Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2002) (citing Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)).

Analysis

Plaintiffs' complaint and motion for preliminary injunction have been brought before this Court based upon a federal statute, the Resource Conservation and Recovery Act (hereinafter "RCRA"), 42 U.S.C. § 6901 et seq. Plaintiffs assert jurisdiction is proper under RCRA pursuant to 42 U.S.C. § 6972(a) because an endangerment to public health has occurred and will reoccur within the District of Idaho. (Docket No. 1, p. 3). Based on the following the Court finds it is without proper jurisdiction in this matter and, therefore, Defendants' motion to dismiss should be granted and the case dismissed in its entirety. Accordingly, the Court will not address the motion for preliminary injunction because the Court's ruling on the motion to dismiss renders the same moot.

1) RCRA Claim:

RCRA governs the handling of both hazardous and nonhazardous solid wastes. Ashoff v. City of Ukiah, 130 F.3d 409, 410 (9th Cir. 1997). Citizens are allowed to initiate a lawsuit to enforce the requirements of RCRA in certain situations. 42 U.S.C. § 6972. Since there has been no evidence of a violation in this case, the only applicable provision allowing for a "citizen suit" which Plaintiffs may invoke is § 6972(a)(1)(B) which states:

> [any person may commence a civil action on his own behalf] against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

(emphasis added). Plaintiffs assert the burning of Kentucky Bluegrass field residue is a disposal of solid waste presenting an imminent and substantial endangerment to health or the environment. Defendants contend the burning is neither a "disposal" nor a "solid waste" and, therefore, RCRA does not apply. Plaintiffs argue the determination of whether the burning in this case is a "disposal" or a "solid waste" is a factual determination that is not proper for the Court to make at this time. The Court respectfully disagrees.

In order to ascertain whether jurisdiction is proper, the Court must interpret the statute in order to determine its applicability to the issues presented in this matter. Interpretation of a statute to determine its applicability to a lawsuit and whether a court possesses jurisdiction are questions of law. In re Cardelucci, 285 F.3d 1231 (9th Cir. 2002) (citing In re Celebrity Home Entertainment, Inc., 210 F.3d 995, 997 (9th Cir. 2000)). The existence of subject matter jurisdiction is a question of law. United States v. Peninsula Communications, Inc., 287 F.3d 832 (9th Cir. 2002) (citing Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001)).

Statutory interpretation begins with the language of the statute. Children's Hosp. and Health Center v. Belshe, 188 F.3d 1090 (9th Cir. 1999) (citing United States v. Ron Enters., Inc., 489 U.S. 235, 241 (1989)). When the plain meaning of a statutory provision is unambiguous, that meaning is controlling. Id.; see also United States v. Partlow, 159 R3d 1218, 1219 (9th Cir. 1998). To determine the plain meaning of a statutory provision, the Court must examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy. Id. (citing Green v. Commissioner, 707 F.2d 404, 405 (9th Cir. 1983). If ambiguity exists, the Court may use legislative history as an aid to interpretation. Id. (citing Green 707 F.2d at 405; Mount Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1453 (9th Cir. 1992)).

When Congress enacted the RCRA and its subsequent amendments, it created a complex response to the problems involved in safely disposing of solid waste. Greenpeace, Inc. v. Waste Technologies Industries, 9 F.3d 1174 (6th Cir. 1993). When confronted with such a complex statutory scheme, a court cannot discern congressional intent by reading an isolated subsection such as § 6972(a)(l)(B) without reference to other related provisions. Id. The court "must interpret the statute as a whole, making every effort not to

interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." Id. at 1179 (citing Lake Cumberland Trust, Inc. v. United States Environmental Protection Agency, 954 F.2d 1218, 1222 (6th Cir. 1992) (citing Boise Cascade Corp. v. United States Environmental Protection Agency, 942 F.2d 1427, 1432 (9th Cir. 1991)).

a) "Disposal" and "Solid Waste":

At issue in this case are the meanings of "disposal" and "solid waste" as contemplated by Congress in promulgating RCRA. In considering the text of the statute as a whole, the Court finds the language in RCRA is unambiguous. See American Mining Congress v. United States E.P.A., 824 F.2d 1177, 1190 (D.C. Cir. 1987) (the statutory language of RCRA is unambiguous). Therefore, the plain meaning of the terms viewed in light of the statute as a whole controls the Court's interpretation of RCRA. See Greenpeace, Inc., 9 F.3d at 1179.

The terms "disposal" and "solid waste" are defined in RCRA, 42 U.S.C. § 6903(3) and (27). "Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid liquid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). "Solid waste" is defined as "any garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations. . . ." 42 U.S.C. § 6903(27). These definitions are broad and may encompass a wide range of activities and materials. However, in viewing these definitions in the context of the entire statutory scheme of RCRA, it becomes clear that the burning of the residue in this case was not meant to fall within the

definitions of "disposal" or "solid waste."

The burning is not a "disposal." RCRA was promulgated to "reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. § 6901(a)(4). In addressing the problem of amassing amounts of solid waste, Congress sought to protect the public health and the environment and to conserve valuable materials and energy resources. 42 U.S.C. § 6902(a). The burning of the residue by the farmers in this case is not the kind of "disposal" RCRA was created to remedy. Even if the burning were considered a "disposal," the Plaintiffs' complaint does not seek a remedy as to the act of burning itself. Instead, Plaintiffs seek relief from the smoke created from the burning. This type of relief, by its very nature, invokes concerns under the Clean Air Act (hereinafter "CAA") which was promulgated specifically to address air quality concerns. See 42 U.S .C. § 7400 et seq. RCRA, on the other hand, was established to remedy the problems surrounding the increasing amounts of solid waste by regulating methods for disposal of the waste.

The crux of this case turns on whether the residue is a "solid waste." The evidence presented in this case establishes that residue is not a "solid waste" as contemplated by RCRA. In applying the plain meaning of the terms used by RCRA in defining "solid waste" as "discarded material," it is clear that "solid waste" contemplates materials to which the owner or producer no longer attaches value or maintains an interest in possessing. See American Mining, 824 F.2d at 1185 (holding that in defining the term "solid waste," "Congress used the term 'discarded' in its ordinary sense -- 'disposed of' or 'abandoned.'"). While there is a dispute in the testimony concerning the purpose and/or benefits of burning, there was no disagreement that burning the residue serves legitimate purposes beyond mere removal of the residue and, therefore, the residue is extremely valuable to the farmers. Thus, the burning

of the residue is not an abandonment or discarding of the material but, instead, an important part of the growth process).[3] These farmers, who have raised Kentucky Bluegrass for many years, testified that the benefits of burning beyond removal of the residue include: the pot ash left on the field after a burn that contains minerals which, without burning, the farmer would have to replace in the soil by using fertilizers or soil conditioners; an increasing photo-enhancement period; fewer diseases and weeds and, thus, fewer pesticides are required on burned fields; and longer crop rotations (i.e. 8 to 10 years as opposed to 3 to 4 years). Plaintiffs contend the residue is a "solid waste" because the farmers' purpose in burning the residue is to remove it from the fields and, therefore, it is a "discarded material." Plaintiffs point to Washington farmers who continue to raise the crop without burning and assert that any benefits of burning are "incidental" to the farmers' primary purpose for burning-residue removal. At the hearing, Plaintiffs' scientific expert, Dr. Paul Meints, disputed the value and extent to which the benefits of burning asserted by the farmers truly exist. The Idaho legislature, however, has corroborated the Defendants' statements regarding the benefits to burning. Idaho Code § 22-4801 states that "[t]he legislature finds that the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations."

Based on the foregoing and viewing the text of the statute as a whole, the Court finds the burning of the residue is not a "disposal" and, further, the residue is not a "solid waste" because it is neither discarded or abandoned but, instead, used as a part of the growth process. Therefore, RCRA does not apply.

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[3] These witnesses include Mr. Arthur Schultheis, Mr. Carl Felgenhauer, Mr. Paul Stearns, and Mr. Wayne Meyer. See Hearing Transcript.

b) Legislative History & Code of Federal Regulations:

Although the Court finds the language of RCRA is unambiguous, the Court notes that the legislative history and the Code of Federal Regulations are consistent with the Court's interpretation of the text of the statute. The legislative history reaffirms that RCRA was established to manage the huge volume of solid waste in this country. H.R. Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239 (The purpose of the legislation is to create a "multifaceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year. . . ."). Throughout the legislative history the committee discusses the problems associated with land disposal of discarded material. More importantly, in defining "solid waste" and "discarded material" the committee stated that "agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses. An increase in reclamation and reuse practices is a major objective of the [RCRA]." Id. at 2, U.S.C.C.A.N. at 6240. The committee further identified that "the term discarded materials is used to identify collectively those substances often referred to as industrial, municipal or post-consumer waste; refuse trash, garbage and sludge . . . [a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this litigation." Id. Thus, the legislative history supports the Court's conclusion that the burning of Kentucky Bluegrass residue is neither a "solid waste" nor "discarded material" within the guise of RCRA.

The Code of Federal Regulations is also instructive as to the term "discarded" as applied to "solid waste." The Code defines "discarded material" as "any material which is," among other things, "abandoned." 40 C.F.R. § 261.2(a)(2)(l); see also Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). The regulations further

provide that materials constitute "solid waste" if they are abandoned by virtue of being "[d]isposed of." See 40 C.F.R. § 261.2(b)(l). The court in Zands, ultimately defined solid waste as "any discarded material," but noted that even this broad definition does not include materials that are still useful products or material retained for immediate reuse. Id. at 1262.

c) State Legislature's Policy:

Plaintiffs offered substantial evidence regarding the decision by the state of Washington legislature establishing a policy which bans the burning of Kentucky Bluegrass residue except in extreme cases.[4] While this evidence is relevant to the balancing of the competing interests in this case, it does not establish that RCRA applies to the facts in this case. Further, the fact that the policies of Washington and Idaho are inconsistent does not give this Court jurisdiction upon which to decide this matter.[5] The evidence does, however, highlight the fact that the Idaho state legislature has established a policy opposite of Washington and determined that agriculture burning is an important state interest and that burning is an "essential tool" to farming that will continue to be used

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[4] In the summer of 1995 the state of Washington began investigating possible alternatives to burning Kentucky Bluegrass. in the spring of 1996 through the spring of 1998, Washington's Department of Ecology established new regulations banning burning, except in certain cases, and certifying alternatives to burning.

[5] In the context of the nuisance claim Plaintiffs contend they are without a state remedy and this matter is more appropriately decided with federal law because the affects of the smoke cross state lines. However, this is not the type of interstate dispute requiring federal intervention into state law matters. See National Audubon Society, et al. v. Department of Water, et al., 869 F.2d 1196 (9th Cir. 1988).

in the state of Idaho. Idaho Code § 22-4801 and IDAPA 02.06.16.012.

Based on these findings, the state of Idaho set regulations that "will allow Idaho farmers to maintain the essential tool of fire, while minimizing the impact on the citizens of Idaho of smoke generated by crop residue burning." IDAPA 02.06.16.012. Specifically, the state of Idaho's Department of Agriculture and Department of Environmental Quality have established a smoke management policy to effectuate the legislative intent. See Idaho Code § 22-4803. Further, the Idaho legislature still requires the enforcement of the state's environmental protection and health act (Idaho Code, Title 39, Chapter 1) and the rules therein as they relate to air quality and the state and national ambient air quality standards, Idaho Code § 22-4801.

Thus, the legislature of the state of Idaho has balanced the competing interests on the issues now raised in this Court and determined the that crop residue burning is an important agricultural interest that will continue in the state of Idaho. Plaintiffs invite the Court to be pro-active and establish the legislature's policy for the state of Idaho. The Court respectfully declines to do so. The remedy, if any, lies with Congress or the state legislature - not the courts.

d) Remedy:

Congress has established methods of enforcement for the protection o f the public health both in RCRA and the CAA. The remedy sought by the Plaintiffs, however, is more appropriately sought under the provisions of the CAA and/or may very well require a change in policy by the legislative branch of government. See 42 U.S.C. § 7470. The Court recognizes the limited nature of raising a citizen suit pursuant to CAA but Congress, not the courts, has delineated a statutory framework within which Plaintiffs must operate. See 42 U.S.C. § 7604(a) (citizen suits allowed to bring suit for violations of

standards or failure to obtain a permit); see also 42 U.S.C. § 7604(a)(2) (allowing citizen suits against the Administrator for allegedly failing to perform any nondiscrctionary act or duty). The evidence here clearly establishes that the national ambient air quality standards have not been violated by the burning of grass residue in previous years and so Plaintiffs may be unable to bring a suit under the CAA and, it appears, the EPA has not acted arbitrarily in declining to do so.[6]

Plaintiffs argue RCRA and the CAA can be reconciled and that to permit citizens suits on matters involving air pollution is not in derogation of an area specifically reserved by Congress to the EPA. The Court respectfully disagrees. While it is true that the Ninth Circuit has not determined that Congress has preempted this field, this does not resolve the fact that RCRA simply does not apply to the facts of this case. See discussion *infra*; see also National Audubon Society. et al. v. Department of Water, et al., 869 F.2d 1196 (9th Cir. 1988). RCRA by its very nature is designed to address areas that are more site specific (i.e. landfills and waste disposal facilities) where the CAA is designed to address air quality in a broader sense, which is what Plaintiffs seek to remedy in this case.[7] To allow citizens

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[6] Plaintiffs have offered evidence that although the EPA air quality standards have not been violated, recent scientific research has determined the standards nay not adequately protect the public's health. If this is the case, the solution to this disparity lies with Congress not with the courts.

[7] Plaintiffs may argue the pollution in this case is site specific to the farms who initiate the burning, however, the evidence failed to establish any link to any specific farm. The Plaintiffs have attempted to couch their claim to fit within RCRA, however, the core of Plaintiffs' complaint seeks a broader resolution than contemplated by RCRA - clean air in northern ldaho - which necessarily implies that Plaintiffs' allegations should be sought under the CAA. Further, in setting the annual 24-hour standard for

suits every time someone disagrees with the air environment would be chaotic, unmanageable, and unduly burdensome on the court system. In this case alone there were approximately 1,800 phone calls made to the state's hotline complaining about the smoke in one burning season. Further, the research and in-depth analysis necessary to address and resolve the concerns presented by these issues can and should only be undertaken by Congress and administrative bodies better suited for such a task.

e) Conclusion:

The Court finds the burning of Kentucky Bluegrass residue is not a "disposal" of "solid waste" as contemplated by RCRA and, therefore RCRA does not apply nor was it intended to apply to the facts presented in this case. This Court, therefore, is without jurisdiction in this matter and Defendants' motion to dismiss as to the Plaintiffs' RCRA claim must be granted. While the Court concludes it is without jurisdiction in this matter, the Court 'is not finding the smoke is not a pollutant or a

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particulates, specifically PM2.5, the EPA has directly addressed the concerns raised by Plaintiffs regarding short intense exposure to particulate matter by sensitive individuals. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,677 (July 18, 1997) (to be codified 40 C.F.R. pt. 50) ("In the Administrator' s judgment, the factors discussed above provide ample reason to believe that both annual and 24-hour PM 2.5 standards are appropriate to protect public health from adverse health effects associated with short- and long-term exposures to fine particles."). Moreover, it appears the EPA, pursuant to CAA, is continuing to research and revise the national Ambient Air Quality Standards for Particulate Matter. See e.g. Review of the National Ambient Air Quality Standards for Particulate Matter 66 Fed. Reg. 61,268, 61,275 December 3, 2001) (the review of the NAAQS was scheduled to be completed by July, 2002 but this date has been pushed back into 2003).

cause of the health problems confronting the citizens in the affected areas.

2) Federal Common Law Nuisance:

Plaintiffs' nuisance claim asserts "Defendants' burning of grass field residue creates an unreasonable interference with the rights of the general public to life, to safe and breathable air, and to be safe in their homes, schools, workplaces, and communities without the threat and harm to health of invasive and noxious smoke and pollution." (Docket No. 1, p. 27). Plaintiffs ask this Court to "enjoin any future burning of grass field residue by Defendants." (Docket No. 1, p. 28). Defendants assert Plaintiffs' nuisance claim should be dismissed because Congress has spoken with particularity to the issues raised in Plaintiffs' complaint in both RCRA and the CA.A. (Docket No. 20, pp. 2, 12-19). Plaintiffs contend it is necessary for this Court to entertain the nuisance claim because the Plaintiffs are without an adequate state remedy and that the controversy's interstate nature makes state law inappropriate."[8]

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[8] Plaintiffs are citizens of Idaho and Washington. Their claims also involve potentially harmful affects in Montana and Canada. The Court acknowledges that the Idaho Supreme Court recently determined that Idaho's long-arm statute provided personal jurisdiction over an out-of-state farming corporation's grass burning that allegedly injured an Idaho citizen in Idaho. McAnally v. Bonjac, Inc., 2002 WL 1419594 (Idaho) (Unpublished and subject to revision at this time). However, Plaintiffs may be precluded from raising a nuisance claim in state court. The Right to Farm Act codified in Idaho Code Title 22, Chapter 45 seeks to reduce the loss of agricultural operations by limiting the circumstances whereby the operations may be deemed a nuisance. Idaho Code § 22-4501. The statute protects existing agricultural operations from being declared a nuisance so long as the operation is not improper or negligent. Idaho Code § 22-4503. The statute prevents the

Nuisance is a common law claim alleging an interference with one's use or enjoyment of their property. BLACK'S LAW DICTIONARY (7th Ed. 1999). "In a federal common law nuisance action, the court is asked to determine whether an act or omission causes damage to the public." National Audubon Society, et al. v. Department of Water, et al., 869 F.2d 1196 (9th Cir. 1988). There is no *general* federal common law. Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision. Id. at p. 1200 (quoting Milwaukee v. Illinois, 451 U.S. 304, 312 (1981)). "[I]t is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law." Id. (citing Milwaukee at 317). The federal common law nuisance claims cannot escape preemption if Congress has "occupied the field . . . through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." Id. Federal common law may be fashioned only where "a federal rule of decision is 'necessary to protect uniquely federal interests'" or an area where "Congress has given the courts the power to develop substantive law." Id. (citations omitted).

While the case law has not determined that Congress has preempted courts from applying federal common law, it is clear that Congress has not given courts the power to develop substantive law in this area. The Ninth Circuit determined that the comprehensive nature of the CAA gives no indication that Congress intended to rely on a body of federal common law to remedy air pollution. See National Audubon Soc., 869 F.2d at 1201 (holding the plaintiff could not properly

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adoption of ordinances or resolutions declaring as a nuisance any agricultural operations operated in accordance with generally recognized agricultural practices. Idaho Code § 22-4504. This state law question, however, is not before the Court and will not be decided here.

assert a federal common law nuisance action based on air pollution but declining to decide whether or not such a cause of action would he preempted by the CAA).

The case at bar presents neither a uniquely federal interest nor an interstate dispute. Therefore, Plaintiffs in this case cannot properly assert a federal common law nuisance action based on air pollution. See National Audubon Soc., 869 F.2d at 1201; see also Save Our Summers v. Washington State Dept. of Ecology, 132 F. Supp. 2d 896 (E.D. Wa. 2000). This case presents questions concerning predominately state policies and interests. Although Plaintiffs contend federal law should control because the effects of the burning cross state lines and affect citizens of different states, this is not the kind of "interstate dispute . . . requiring resolution under federal law. . . ." National Audubon Society, 869 F.2d at 1205 (recognizing that the "[Supreme] Court considers only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control, and therefore subject to resolution according to federal common law."). Moreover, even the fact that Idaho and Washington maintain essentially conflicting policies regarding burning does not rise to the level of an interstate dispute requiring federal resolution. Id.

Based on the foregoing the Court finds the Plaintiffs' nuisance claim seeking to invoke federal common law must also be dismissed. The Court further notes that this ruling does not leave the Plaintiffs without any remedy, the remedy sought by Plaintiffs simply must be achieved through the proper channels whether that be the CAA, through the EPA, or pursuing changes through legislative means.

ORDER

Based on the foregoing and being fully advised in the premises, the Court HEREBY ORDERS as follows:

1) Defendants' Motion to Dismiss is **GRANTED** and the case is **DISMISSED IN ITS ENTIRETY**.

2) Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Exclude Expert Witnesses are **DENIED AS MOOT**.

IT IS SO ORDERED this [19th day] of July, 2002.

EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAFE AIR FOR EVERYONE, Plaintiff-Appellant

v.

WAYNE MEYER, et al., Defendants-Appellees
No. 02-35751
Order

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Bane. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

Filed October 5, 2004

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Resource Conservation and Recovery Act

Section 1004 [42 U.S.C. § 6903]

Definitions

* * *

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

* * * * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * * * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

* * * * *

(34) The term "treatment," when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

* * * * *

Section 7002 [42 U.S.C. § § 6972]

Citizen suits

(a) In general. Except as provided in subsection (b) or (c)

of this section, any person may commence a civil action on his own behalf--

(1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is

contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g).

(b) Actions prohibited.

(1) No action may be commenced under subsection (a)(1)(A) of this section--

(A) prior to 60 days after the plaintiff has given notice of the violation to--

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.
In any action under subsection (a)(1)(A) in a court of the United States, any person may intervene as a matter of right.

(2) (A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to--

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B), except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

(i) has commenced and is diligently prosecuting an action under section 7003 of this Act or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980;

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and is diligently proceeding with a remedial action under that Act; or (iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [1980] or section

7003 of this Act pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.
In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B);

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and is diligently proceeding with a remedial action under that Act.

(D) No action may be commenced under subsection (a)(1)(B) by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter,

impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice. No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this Act may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention. In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs. The court, in issuing any final order in any action brought pursuant to this section or section 7006 may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek

enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters. A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

****

Excerpts from Transcript of
Preliminary Injunction Hearing (July 10-11, 2002)

Testimony of Donald W. Jacklin

Direct Examination

Questions by Mr. HcHugh [Co-Counsel for Plaintiff]

* * * * *

Q. Are you familiar then, based on your work with Jacklin Seed, as to the reason for burning grass field residue?

A. Yes, I am. Basically we burned our fields and other farmers burned their fields for the primary purpose of a photo induction for increased seed yield.

Q. With regards to that, is that the primary purpose.

A. That is the primary purpose.

Q. Can you put a percentage on that? How high of percent of that is the reason why?

A. If I were to say what is the major reason I burned, 99.9 percent of it is for burning for a photo period or a photo induction enhancement of seed yield.

Q. Describe what the photo induction period is.

A. A photo induction period, I guess I can best describe as comparing it in comparing an Easter lilly. If you have an Easter lilly and you give it a certain day length, it be be vegetative or just leaf up until a certain period of time. As it gets closer to Easter, you increase the daylight and it receives a photo induction period and it flowers. So it has a reproductive part to it.

That is essentially what happens with all plants that do flower and Kentucky bluegrass is the same scenario. So those new green tillers that emerge following a burn are subjected to sunlight. If they don't get sunlight, they are going to be very vegetative, which the homeowner wants vegetation, he doesn't want seed production. So the farmer's trick is to convince that plant, if you will, through their practices to go reproductive instead of vegetative.

By burning in the fall, it rids the surface and the canopy so we have a bare soil. The new tillers or new tissue comes up, receives sunlight and basically creates a photo period that tells the plant be reproductive this next year rather than vegetative.

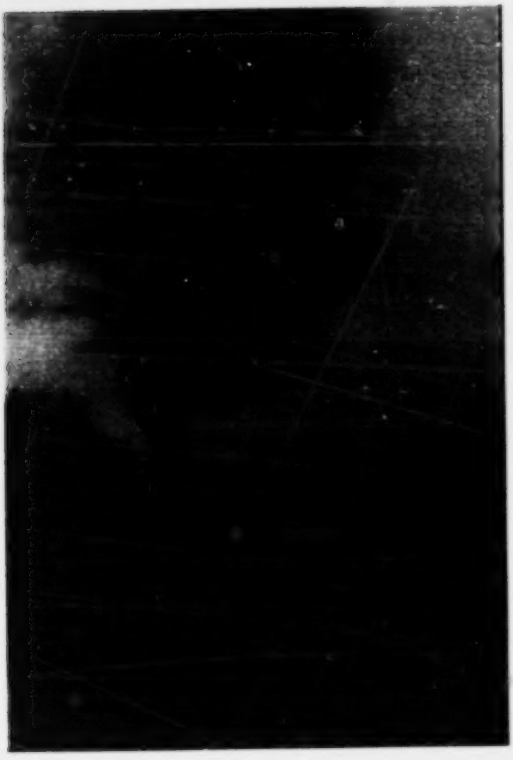
And you can actually go in then in December, January and February, dissect those little shoot tissues and a seed head primordia, or in normal terms, a seed head fetus and it will be reproductive or vegetative based on the amount of sunlight exposure you receive in the fall.

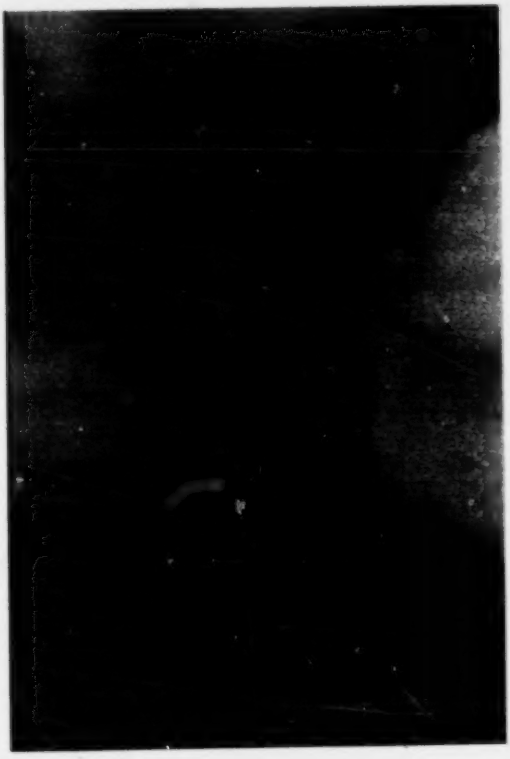
Q. How important is it to remove the residue quickly after harvest?

A. Extremely important. It needs to come off as soon as possible and obviously as much as possible.

*****

June 3, 2002, Declaration of Arthur Long, Exhibit F





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APR 6 - 2005

No. 04-1055

IN THE

Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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OBJECTION TO PETITIONER'S QUESTION PRESENTED

Pursuant to the provisions of Rule 15.2, the Growers object to Petitioner's characterization of the question presented in this matter. The Ninth Circuit held that Petitioner "has not demonstrated a genuine issue of material fact on the issue whether grass residue was 'discarded' within the meaning of the Resource Conversation and Recovery Act, ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and was therefore a 'solid waste' under the statute." Pet. at A18. Petitioner's question presented contains two underlying assumptions that do not accurately reflect the record below. First, neither the District Court nor the Ninth Circuit found that Kentucky bluegrass straw and stubble were "secondary material." Second, both the District Court and the Ninth Circuit found that Petitioner presented no evidence to contradict that the Growers' use of their straw and stubble as part of "a continuous farming process effectively designed to produce Kentucky bluegrass." Pet. at A15.

The proper question presented is whether the Ninth Circuit erred in finding that, based upon the undisputed evidence, there was no genuine issue of material fact that the Growers do not "discard" their Kentucky bluegrass straw and stubble, and therefore their use of this material is not governed by RCRA.

TABLE OF CONTENTS

	Page
OBJECTION TO PETITIONER'S QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
THE COURSE OF THE LOWER COURT PROCEEDINGS	2
1. Factual Background	2
2. The District Court Dismisses the Complaint	7
REASONS FOR DENYING THE PETITION	10
I. The Ninth Circuit's Opinion Is Based Upon and Is Entirely Consistent With RCRA's Statutory Definition of "Solid Waste"	11
II. The Ninth Circuit's Opinion Is Consistent With The RCRA Jurisprudence of Other Circuit Courts of Appeal and Creates No Conflict Between the Circuits	17
III. The Ninth Circuit's Opinion Has Created No Loophole in Enforcement of RCRA's Hazardous Waste Regulations.	24

Contents

Page

A. EPA's Hazardous Waste Regulatory Definition of Solid Waste Is Inapplicable to This Matter Because Neither Stubble Nor Straw Is Hazardous. 24

B. The Ninth Circuit's Opinion Creates No Loophole In Regulating Hazardous Wastes. 28

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

Cases:

3550 Stevens Creek Associates v. Barclays Bank of California, 915 F.2d 1355 (9th Cir. 1990) 12

A&W Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107 (9th Cir. 1998) 12

American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) ..... *passim*

American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990) 5, 14, 18, 20

American Petroleum Institute v. EPA, 906 F.2d 729 (D.C. Cir. 1990) 4-5, 23

Association of Battery Recyclers, Inc., v. EPA, 208 F.3d 1047 (D.C. Cir. 2000) 5, 12, 18, 19, 23

Bradley v. Austin, 841 F.2d 1288 (6th Cir. 1988) ... 26

Butler v. City of Prairie Village, Kansas, 172 F.3d 736 (10th Cir. 1999) 13

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Connecticut Coastal Fishermen's Assn. v. Remington Arms Co., Inc. et al., 989 F.2d 1305 (2d Cir. 1993) 18, 22

Gallenstein v. United States, 975 F.2d 286 (6th Cir. 1992) 26

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Page

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No Spray Coalition, Inc. v. City of New York, 252 F.3d 148 (2d Cir. 2001) 23

Owen Electric Steel Co. v. Browner, 37 F.3d 146 (4th Cir. 1994) 22, 23

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 9

Richards v. United States, 369 U.S. 1 (1962) 9

Safe Food & Fertilizer v. EPA, 350 F.3d 1263 (D.C. Cir. 2003) 19, 23

Securities Industry Ass'n v. Board of Governors, 468 U.S. 137 (1984) 9

United States v. ILCO, Inc., 996 F.2d 1126 (11th Cir. 1993) 18, 20, 21, 22

U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd, 55 F.3d 1276 (7th Cir. 1995) 12

Cited Authorities

	Page
Statutes:	
Resource Conversation and Recovery Act	
42 U.S.C. § 6901 *et seq.*	i
42 U.S.C. § 6902(a)	4
42 U.S.C. § 6903(27)	4, 12
42 U.S.C. § 6972	5
42 U.S.C. § 7400 *et seq.*	3
42 U.S.C. § 7404(a)	3
42 U.S.C. § 9601(29)	12
National Ambient Air Quality Standard for Particulate Matter	
40 C.F.R. Part 50	3
40 C.F.R. § 261	24
40 C.F.R. § 261.2	21
40 C.F.R. § 261.1(b)(1)	25
40 C.F.R. § 261.2(c)	27
40 C.F.R. § 261.2(e)(i)	27
Idaho Code § 22 – 4801 *et seq.*	6, 27
Idaho Code § 39 – 2305(2)(a)	3
Idaho Code § 39 – 2305(2)(b)	3
Other Authorities:	
The Shorter New Oxford English Dictionary 684 (4th ed. 1993)	12
H.R. Rep. No 94-1491 (1976), reprinted in 1976 U.S.C.C.A.N. 6238	4, 13

COUNTERSTATEMENT OF THE CASE

This Petition for a Writ of Certiorari stems from the dismissal of a citizen's suit brought in the District of Idaho arising under the RCRA. Petitioner challenged the age-old practice of agricultural burning conducted by Respondents, growers of Kentucky Bluegrass in Kootenai and Benewah counties of the panhandle of northern Idaho ("Growers"). The Growers conduct agricultural burning under the strict supervision and control of the State of Idaho and pursuant to a permit granted by the State of Idaho. Petitioner asserts that the Growers' burning activities constitute a violation of RCRA and an imminent and substantial endangerment to public health and the environment, despite operating, at all times, under a carefully state regulated burning program under the auspices of the federal Clean Air Act.

Following a lengthy evidentiary hearing on the Petitioner's Motion for a Preliminary Injunction and the Growers' Motion to Dismiss, the District Court found that the Growers used their stubble and straw as part of the growth process and did not abandon or discard it. Pet. at A39. The District Court dismissed Petitioner's complaint, holding that the Growers' bluegrass straw and stubble was not a "solid waste" and therefore RCRA did not apply. *Id.*

The Ninth Circuit affirmed the dismissal, holding that the Growers' Kentucky bluegrass stubble and straw were not solid wastes, the core prerequisite for any RCRA action. The Ninth Circuit, which reviewed the District Court's dismissal *de novo*, found that the undisputed evidence established that the Growers used the stubble and straw as part of a continuous process of growing bluegrass and did not discard or abandon it. After the Ninth Circuit issued its opinion, Petitioner moved for reconsideration and for an *en banc* hearing. Petitioner's motion was denied without receiving a single vote in favor of further consideration.

The Petition asserts that the issuance of a Writ of Certiorari is appropriate in light of the Ninth Circuit's alleged misconstruction of the definition of "solid waste," the existence of an alleged circuit conflict and the creation of a "broad loophole" which purports to seriously erode RCRA's effectiveness. None of Petitioner's contentions have merit. The Ninth Circuit's opinion was correctly premised upon its application of the unambiguous meaning of the term "solid waste" to the facts presented, in accordance with Congress' clear definition of that term. No circuit split exists and the Ninth Circuit's opinion is entirely consistent with the opinions of all other circuits, including those issued by the D.C., Second, Fourth and Eleventh Circuits. Finally, Petitioner's claim that the Ninth Circuit's opinion creates a broad loophole in RCRA's effectiveness is unsupportable. Accordingly, the Growers respectfully submit that the Petition be denied.

THE COURSE OF THE LOWER COURT PROCEEDINGS

1. Factual Background

For decades, growers of Kentucky bluegrass in north Idaho have conducted agricultural field burning of Kentucky bluegrass straw and stubble as part of their normal farming operations. The Growers farm on portions of the Coeur d'Alene Indian Reservation and on the Rathdrum Prairie in Kootenai and Benewah Counties, in the northern panhandle of Idaho. At the time of the filing of this action, approximately 30,000 acres were utilized for bluegrass seed production on the Coeur d'Alene Indian Reservation and approximately 7,000 acres were utilized on the Rathdrum Prairie.[1]

In north Idaho, Kentucky Bluegrass is a turf grass grown primarily for the production of seeds for commercial

1. Substantially fewer acres of Kentucky bluegrass are currently in production in north Idaho than were grown at the time of the filing of Petitioner's complaint.

sale. The process for growing bluegrass in north Idaho involves an initial spring planting of seeds. The Growers actively monitor and assist the growth and flowering of the grass plant during the remainder of the first year and through the middle of the summer of the following year. After the grass has flowered during the second year, the stems are cut, leaving the cut grass seeds, stems, and stubble on the field in order to dry. The Growers use combines to harvest the grass seeds through a process of cutting, separating, and collecting the seeds for further cleaning and processing for sale to the consumer. The remaining post-harvest materials, which includes straw and stubble are used for plant regeneration and are burned *in situ. See* Pet. at A2.

The practice of agricultural burning in Idaho is regulated by the United States Environmental Protection Agency ("EPA") pursuant to the federal Clean Air Act ("CAA") (42 U.S.C. § 7400 *et seq.*) and by the National Ambient Air Quality Standard for Particulate Matter (40 C.F.R. Part 50). The State of Idaho enforces the CAA through its EPA-approved State Implementation Plan ("SIP"). State and local officials in Idaho are required to and do monitor atmospheric conditions prior to granting authorization to each Grower to burn each of their grass fields.[2] Pursuant to state laws, open burning in Kootenai and Benewah Counties is conducted only when "weather conditions are conducive to good smoke dissipation . . . and [if] the burning does not violate current state and federal air quality standards." Idaho Code § 39-2305(2)(a). Stubble and straw can only be burned on the field where it was grown. Idaho Code § 39-2305(2)(b).

Agricultural burning is essential to producing consistent and maximum yields of a healthy seed crop the following year.

2. Each State has primary responsibility for assuring air quality within the entire geographic region comprising such state. 42 U.S.C. § 7404(a). The Idaho Department of Environmental Quality ("IDEQ"), pursuant to a delegation of authority from EPA pursuant to the CAA, administers its own elaborate air-quality program pursuant to its SIP.

Burning stimulates the soil, recharges and provides nutrients for the grass plant's root system, assists in eliminating parasitic pests and destructive molds and fungus growth, and dramatically lengthens the lifespan of a bluegrass field to as much as twenty years.[3] The field burning process also substantially increases the yield of virtually all bluegrass seed varieties. If Kentucky bluegrass fields in north Idaho are not burned, the crop yields the following years are dramatically reduced to a small fraction of prior yields and Growers must plow and replant the field in order for them to remain economically viable. Pet. at A12-14.

The Resource Conservation and Recovery Act and Petitioner's Citizen Suit Action

In 1976, Congress enacted RCRA "to promote the protection of health and the environment" and to eliminate "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." 42 U.S.C. § 6902(a); H.R. Rep. No 94-1491 at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6241. RCRA applies *only* to materials that meet the statutory definition of "solid waste."[4] The term "solid waste" was specifically defined by Congress as "any garbage, refuse, sludge . . . and other *discarded* material . . . resulting from industrial, commercial, mining, and agricultural operations. . . ." 42 U.S.C. § 6903(27) (emphasis added).

As the statutory language makes clear, Congress did not intend that RCRA govern all materials. Rather, it clearly and unambiguously intended that its application be limited to governing materials that are *discarded* and are no longer wanted by the generator. *See American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) ("*AMC I*"); *American*

3. The process of field burning is also environmentally beneficial, adding badly needed topsoil to the fields and enhancing water quality because the fields are neither plowed nor is the soil disturbed.

4. Hazardous waste is a subset of "solid waste." Stated differently, if a substance is not a solid waste, it cannot be a hazardous waste.

Petroleum Institute v. EPA, 906 F.2d 729, 732 (D.C. Cir. 1990); *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ("*AMC II*"); *Association of Battery Recyclers, Inc., v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). Congress specifically declared that "agricultural products that could be recycled or reused as fertilizers were *not* its concern," inasmuch as it is "not a part of the discarded materials disposal problem" RCRA was designed to address. *See* Pet. at A17 (emphasis in original).

Petitioner brought this action under RCRA's citizen suit provision. 42 U.S.C. § 6972. To prevail in a RCRA citizen suit action, a plaintiff must prove,

> (1) that the defendant is a person . . . who was or is a generator or transporter of *solid or hazardous waste*. . . ; (2) that the defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of *solid or hazardous* waste; and (3) that the *solid of hazardous* waste may present an imminent and substantial endangerment to health or the environment.

See Interfaith Community Org. v. Honeywell, Int'l, Inc., 399 F.3d 248, 258 (3d Cir. 2005). Any threat of imminent and substantial endangerment to health or the environment must be caused by "solid waste" as that term is defined in RCRA. *See* Pet. at A8. Absent proof that a defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of a *solid waste*, a plaintiff cannot prevail under RCRA's citizen suit provision.[5]

5. Although Petitioner argued that the evidence demonstrated that the Growers' burning activities caused substantial endangerment to health and the environmental, the District Court disagreed. It noted that Growers' activities did not cause a violation of the EPA's air quality standards and that "the evidence failed to establish any link to any specific farm." Pet. at A43 n.7. Since the filing of the complaint, three burn seasons have taken place. Neither the EPA nor Idaho's Department of Environmental Quality have taken any action to restrict or curtail this lawful practice. Moreover, despite the filing of a class action personal injury lawsuit in Idaho state court and repeated attempts by those plaintiffs to obtain injunctive relief, no validly issued injunction has been issued and the Growers have continued to burn each summer in accordance with Idaho law.

The Evidence Presented During District Court Proceedings

Much of the testimony and other evidence presented below concerned the practice of agricultural field burning. Several witnesses testified that burning provided fertilizer for the next year's crop by returning phosphorus and potassium to the soil. *See* Pet. at A13. Other witnesses testified that burning substantially increased the productive life of a bluegrass field. *Id.*

Petitioner presented no evidence that contradicted the Growers' testimony that the burning of Kentucky bluegrass straw and stubble is a critical part of the growing process in north Idaho. Indeed, one of Petitioner's witnesses, Donald Jacklin, a former bluegrass grower who utilized burning, testified that "nothing beats burning" for increased yields of bluegrass seeds, longevity of the fields, and reducing the need to use pesticides, herbicides or fungicides. *Id.* Mr. Jacklin also noted burning maximizes the photo-induction potential and that farmers are unable to use close cropping machines due to the extremely rocky soil conditions. *Id.*

The Growers also submitted evidence in support of the undisputed fact bluegrass straw and stubble are important to the continuous process of producing Kentucky Bluegrass seed. *See* Pet. at A13-15. The Growers also submitted evidence that they used and did not dispose of the stubble and straw. *Id.* Instead, the Growers used these materials in the seed production process as part of the only effective method available in north Idaho to achieve and maintain economically viable yields, to expose the plant crown to sunlight, air and moisture, to reduce parasitic bug infestation; to reduce the growth of fungi, to reduce weed growth, to reduce the rodent population, and to condition the soil. *Id.* Finally, the Growers' testimony was consistent with the findings of the Idaho legislature that "the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations." Idaho Code § 22-4801.

2. The District Court Dismisses the Complaint

The District Court conducted a thorough analysis of the evidence presented and concluded that agricultural field burning did not fall within RCRA's definition of "solid waste." The District Court, "viewing the definitions of 'solid waste' and 'disposal' in the context of the entire statutory scheme of RCRA," held that burning of bluegrass stubble and straw was "not meant to fall within the definitions of 'disposal' or 'solid waste.'" Pet. at A37-38. Judge Lodge concluded that RCRA was inapplicable because the Growers did not discard or abandon the bluegrass stubble and straw, "but instead, used [it] as part of the growth process." *Id.* at A39. The District Court's opinion was premised upon its determination that a material must be discarded before it is deemed to be a "solid waste." *Id.*

The Petitioner failed to present even a scintilla of evidence to contradicts the Growers' evidence that they used their bluegrass straw and stubble as part of the growing process. Likewise, Petitioner put forth no evidence that the Growers abandoned or discarded this material. The undisputed testimony conclusively established that the Growers uniformly intended to utilize the straw and stubble and not to discard it.[6] The District Court concluded that because the Growers used the stubble and straw as part of the growth process, and did discard or abandon it, the bluegrass stubble and straw was not a solid waste and RCRA did not apply. Pet. at A39. The District Court also found that the particulate matter generated by the burning of Kentucky bluegrass straw and stubble invoked concerns under the Clean

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6. The District Court found that

> there was no disagreement that burning the residue serves legitimate purposes beyond mere removal of the residue and, therefore, the residue is extremely valuable to the farmers. Thus, the burning of the residue is not an abandonment or discarding of the material but, instead, an important part of the growth process.

Pet. at A38-39.

Air Act, not RCRA, noting that the burning in this case was not what Congress intended to be regulated by RCRA.[7] *Id.* at A43. The District Court also commented that even if the burning was considered a "disposal," the complaint:

> does not seek a remedy as to the act of burning itself. Instead, Plaintiffs seek relief from the smoke created from the burning. This type of relief, by its very nature, invokes concerns under the Clean Air Act (hereinafter "CAA") which was promulgated specifically to address air quality concerns. *See* 42 U.S.C. § 7400 et seq. RCRA, on the other hand, was established to remedy the problems surrounding the increasing amounts of solid waste by regulating methods for disposal of the waste.

---

7. The District Court stated,

> RCRA by its very nature is designed to address areas that are more site specific (i.e. landfills and waste disposal facilities) where the CAA is designed to address air quality in a broader sense, which is what Plaintiffs seek to remedy in this case. To allow citizens suits every time someone disagrees with the air environment would be chaotic, unmanageable, and unduly burdensome of the court system.

Pet. at A43-44. The District Court further noted

> Congress has established methods of enforcement for the protection of the public health both in RCRA and the CAA. The remedy sought by the Plaintiffs, however, is more appropriately sought under the provisions of the CAA and/or may very well require a change in policy by the legislative branch of government. *See* 42 U.S.C. § 7470. . . . The evidence here clearly established that the national ambient air quality standard have not been violated by the burning of grass residue in previous years and so Plaintiffs may be unable to bring a suit under the CAA and, it appears, the EPA has not acted arbitrarily in declining to do so.

Id. at A42-43.

Id. at A38. In sum, the District Court correctly concluded that the burning of the bluegrass straw and stubble was an integral part of the process of grass seed production and is not discarded.

The Ninth Circuit Affirms the District Court's Judgment, Concluding That RCRA Is Inapplicable As Kentucky Bluegrass Straw and Stubble are Not Solid Wastes

The Ninth Circuit affirmed the District Court's judgment, concluding that Petitioner failed to establish a genuine issue of material fact regarding whether Kentucky bluegrass stubble and straw is a "solid waste" under RCRA. Pet. at A2. In reaching this conclusion, the Ninth Circuit reviewed RCRA and its statutory definition of "solid waste," various Circuit Court opinions interpreting the definition of "solid waste" and RCRA's legislative history. *Id.*, at A8.

As this Court has often observed, "the starting point in every case involving statutory construction is 'the language employed by Congress.'" *CBS v. FCC*, 453 U.S. 367, 377 (1981), (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). Federal courts are required to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 149 (1984) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

The Ninth Circuit relied upon RCRA's unambiguous statutory definition of "solid waste" and focused its attention on whether the Growers' bluegrass straw and stubble were *discarded materials.* Pet. at A9. The Ninth Circuit looked to the dictionary definition of the verb "discard" and to the *undisputed evidence* that the Growers use the stubble and straw in a continuous process of growing Kentucky bluegrass. The Ninth Circuit held that because the Growers use and therefore do not abandon or discard the stubble and straw, it is not a solid waste. Pet. at A15. The Ninth Circuit's opinion is discussed in more detail, *infra.*

REASONS FOR DENYING THE PETITION

The Petition should be denied because Petitioner has failed to establish that any compelling reason for the issuance of a Writ of Certiorari exists. Despite Petitioner's predictions to the contrary, the Ninth Circuit's opinion addresses the narrow issue of whether, based upon the *undisputed* evidence presented, the Growers' Kentucky bluegrass stubble and straw is a solid waste under RCRA. The opinion of the Ninth Circuit, the first appellate court to address the obscure claim that the burning of Kentucky bluegrass presents an imminent and substantial danger to public health and the environmental, does not conflict with any decision issued by this Court or any of the circuit courts. Moreover, the Ninth Circuit did not depart from the accepted and usual course of judicial proceedings nor did it sanction such a departure by the District Court. Finally, given the undisputed evidence presented that the Growers use and do not abandon or discard the stubble or straw, no erroneous factual findings exist.

The Petition takes issue with a narrow opinion of the Ninth Circuit which sets no new standards nor has wide applicability. Petitioner argues that the Ninth Circuit's reasoning is contrary to the plain meaning of RCRA's statutory language, that its opinion lies in direct conflict with the opinions of no fewer than five other circuit courts of appeals, and that a broad loophole has been created which will allow circumvention of RCRA's protections.[8] Petitioner also claims that the Growers' burning activities provide only "incidental benefits" and that the Ninth Circuit should have conducted an analysis of the Growers' "handling" of the straw and stubble.

Petitioner's arguments ignore that no circuit conflict exists. Also, it fails to recognize that the District and Circuit courts

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8. While Petitioner contends that a broad loophole in RCRA enforcement has been created, they fail to point to even a single example of any contributors to the nation's solid or hazardous waste problem who have avoided any regulatory oversight by EPA based upon the Ninth Circuit's opinion.

conducted the critical analysis required in any action brought under RCRA's citizen suit provision and properly concluded, based upon *uncontroverted* evidence, that the Growers use the straw and stubble as a continuous part of the growth process. *See* Pet. at A18, A39 Both courts properly concluded that the stubble and straw were therefore not "solid wastes" regulated under RCRA. *Id.*

Petitioner's assertions that the Growers merely derive "incidental benefits" from the burning of the stubble and straw ignore the clear findings of the Ninth Circuit based upon the *undisputed evidence*. Pet. at A15. Finally, the Petition is little more than a request to review the Ninth Circuit's comment, in a *footnote*, it did not need to determine whether the Growers' burning activities constituted a "handling" of those materials under RCRA because it had already determined that the stubble and straw were not "solid wastes." Pet. at A19 n.15.

The Ninth Circuit noted that its opinion was strictly limited to the application of the existing RCRA jurisprudence to the *undisputed* evidence presented. "We only hold that, *in these circumstances of Kentucky bluegrass farming, grass residue customarily used in the farming cycle is not 'solid waste' under RCRA*." *Id.* at A19 n.14 (emphasis added). Petitioner's arguments are a thinly veiled attack on factual findings based upon the *uncontroverted* evidence presented below. In sum, the Petition raises issues which have little likelihood of being applicable to any action which could arguably arise in the future under RCRA, does not present a circuit conflict, and does not warrant the issuance of a Writ of Certiorari.

I. The Ninth Circuit's Opinion Is Based Upon and Is Entirely Consistent With RCRA's Statutory Definition of "Solid Waste"

The cornerstone of the Ninth Circuit opinion was its correct conclusion that the stubble is not a "solid waste." Under RCRA, "solid waste" is defined as any garbage, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air

pollution control facility and other *discarded material*. 42 U.S.C. § 6903(27) (emphasis added). The Ninth Circuit relied upon RCRA's unambiguous statutory definition of "solid waste." Pet. at A9. It focused its attention on *discarded material* and looked to the dictionary definition of the verb "discard." The Shorter New Oxford English Dictionary defines "discard" as "to cast aside, reject, abandon, give up." *Id.* (citing 1 The Shorter New Oxford English Dictionary 684 (4th ed. 1993).[9] The Ninth Circuit also relied upon the opinions of the D.C. Circuit, which has repeatedly held that RCRA is an unambiguous statute that need not and should not rewritten by this or any other court. *See AMC I*, 824 F.2d at 1186 n.11 (rejecting EPA's argument that a narrow reading of "discarded" would "vitiate" RCRA's remedial purpose); *see also Battery Recyclers*, 208 F.3d at 1056 (RCRA's statutory language was unambiguous and did not present the exceptional circumstances warranting resort to its legislative history).[10]

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9. Opinions interpreting CERCLA also provide helpful guidance, as the statutory definition of disposal in that statute is no difference from the one found in RCRA. *See* 42 U.S.C. § 9601(29). The Ninth Circuit stated that "[p]roperty is abandoned when the owner intends to divest himself of all interest in it" *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir. 1998). *See also 3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355, 1362 (9th Cir. 1990) ('disposal' refers only to the affirmative act of discarding a substance as waste, and not to the productive use of the substance).

10. "[A] liberal construction does not mean one that flies in the face of the structure of the statute." *U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995). Various Circuits Courts of Appeal have applied these same principles of statutory construction even when the statutes are remedial if the statute were unambiguous. In *AIC*, the Seventh Circuit recognized that the "employment discrimination statutes have broad remedial purposes and should be interpreted liberally, but that cannot trump the narrow focus conclusion we draw from the structure and logic of the statutes." *Id.* (holding that individuals who do not otherwise meet

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The Ninth Circuit, after applying the statutory definition of "solid waste" to the "*undisputed* evidence that the Growers reuse the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass," concluded that no genuine issue of material fact existed as to whether grass residue is "discarded material." *Id.* at A15 (emphasis added). The Ninth Circuit, based upon the voluminous record, properly found that the evidence supported the determination that the stubble "is not discarded, abandoned, or given up." Based upon these well-grounded determinations of fact and its statutory definition, the Ninth Circuit concluded that bluegrass stubble and straw therefore "does not qualify as 'solid waste' under RCRA." *Id.*

The Ninth Circuit's opinion is consistent with Congressional intent in enacting RCRA. Congress made clear that its focus was with materials that were truly wastes and not materials that were not discarded.

> Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses. . . . Agricultural wastes that are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.

H.R. Rep No. 94-1491, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N., 6239.

It is also well settled under RCRA that materials that are reused in an *ongoing* manufacturing or industrial process are not solid wastes. *See AMC I*, 824 F.2d at 1186. The D.C. Circuit

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the statutory definition of employer cannot be held liable under the ADA). *See also Butler v. City of Prairie Village, Kansas*, 172 F.3d 736, 744 (10th Cir. 1999) ("while the ADA's remedial purposes are broad and far-reaching, the statute imposes liability only on a specifically defined class of persons").

in *AMC I* held such materials were not solid wastes, because they "have not yet become part of the waste disposal problem; rather, *they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.*" *Id.* (emphasis in original). Because such materials were never "disposed of, abandoned, or thrown away," the court concluded, they were not "discarded" within the meaning of RCRA. *Id.* at 1193.

The Ninth Circuit correctly followed the reasoning of the D.C. Circuit in *AMC I* in holding that Congress clearly intended to grant EPA's authority under RCRA "*only* to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id.* at 1190 (emphasis added). In concluding that the bluegrass stubble and straw were always retained and used by the Growers as part of the growth process and were therefore not discarded materials, the Ninth Circuit reasoned that "encompassing materials retained for immediate reuse within the scope of 'discarded material' strains, to say the least, the everyday usage of that term. Pet. at A10 (citing *American Mining Congress v. E.P.A.*, 907 F.2d 1179, 1184 (D.C. Cir. 1990)).

Petitioner ignores that it failed to demonstrate a genuine issue of material fact that the stubble and straw were solid wastes under RCRA and contorts the Ninth Circuit's holding in an attempt to support its argument that "solid waste" "cannot extend to secondary materials . . . so long as such recycling provides some economic 'benefits' to the recycler."[11] Pet. at 25. Although Petitioner acknowledges that the "statutory touchstone" for determining whether a substance is solid waste turns on whether such material is discarded, rather than focus on whether or not

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11. Although Petitioner claims that this was the Ninth Circuit's central holding, review of its opinion leads to the clear conclusion that it was not.

the Growers discarded their post-harvest Kentucky bluegrass straw and stubble, as the Ninth Circuit correctly did, it appears to argue that virtually all materials generated by agricultural (and other) producers constitutes "secondary material."

Petitioner's argument consists of three unsupportable elements. In the first, Petitioner mischaracterizes bluegrass straw and stubble as "secondary materials."[12] In the second, Petitioner argues that the burning of the stubble and straw produces only "incidental benefits" to the Growers. In its third element, Petitioner attempts to broaden EPA's regulations related to hazardous waste to cover straw and stubble.

Petitioner's arguments are incorrect, ignore the *undisputed* findings made below and attempt to elevate irrelevant issues. First, although Petitioner repeatedly describes the straw and stubble as "secondary," neither the EPA nor the District or Circuit court has used that term. Petitioner, without any basis, attempts to diminish the importance of the stubble and straw. To the contrary, given the Growers' active use of those materials as part of the growth process, they are critical thereto. Petitioner characterizes the bluegrass straw and stubble as providing merely "incidental benefits" to the growing of Kentucky bluegrass and assert, without any basis, that the benefits of the burning of the stubble and straw are incident to the Growers' goal of removing the residue. Pet. at 11. Petitioner's assertions are contrary to the undisputed evidence presented which clearly established that the Growers obtain far more than incidental benefits. Pet. at A15. They are also tantamount to an improper request to judicially fashion a hierarchical system which substitutes

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12. Petitioner broadly defines "secondary material" as "any material generated by 'industrial, commercial, mining and agricultural' materials." Pet. at 4. Under Petitioner's definition, secondary material includes all agricultural products, including the bluegrass seeds that are harvested, gathered and sold by the Growers. Congress clearly did not intend to regulate products destined for commercial sale in enacting RCRA.

RCRA's clear requirements with an analysis which compares the benefits of a particular practice (e.g. burning) with other alleged goals (e.g. removal).

Petitioner ignores that the judicial analysis of whether a material is discarded is fact-specific and highly dependent on evidence regarding the owner's intent. This case, like all other RCRA actions, involved an initial determination regarding whether the material in question is a solid waste. That analysis necessarily involves a thorough examination of the evidence presented, with a particular focus on the testimony presented by the owner of the materials about his intent regarding how those materials are used in the production process and whether or not the owner intends to relinquish or cast them aside. Accordingly, opinions based upon factual determinations in one RCRA action are rarely applicable to another, unless they involve the same material.

Petitioner ignores that the Ninth Circuit determined that the Growers derive critical "farming benefits" from the burning of the straw and stubble. *Id.* Petitioner simply cannot overcome the Ninth Circuit's core conclusion that the *uncontroverted evidence* supported the determination that they were not discarded and therefore not solid wastes.[13] Petitioner admits that the nitrogen that is created following the burning of the straw and stubble and is returned to the soil "would not be considered 'solid waste' because they are not being 'discarded.'"[14] Pet. at 17. Finally, Petitioner ignores that the testimony of its own witnesses supported the Growers' claims regarding the

13. After finding that Petitioner did not contradict the evidence presented by the Growers that stubble and straw is beneficial to the growing of Kentucky Bluegrass, the Ninth Circuit noted that "[i]t is not enough for Safe Air merely to argue that the uncontested benefits are ancillary." Pet. at A19, n.14.

14. Petitioner fails to explain how some alleged recycled materials resulting from a continuous manufacturing process are excluded from the regulatory definition of solid waste (e.g. nitrogen returned to the soils as fertilizer) while others are not.

importance and benefits of burning to the growing of Kentucky bluegrass in north Idaho. *Id.* at A13.

In sum, Petitioner's arguments regarding the statutory and regulatory definitions of solid waste, in essence, ask this Court to determine whether or not Kentucky bluegrass straw or stubble is a solid waste through a new test which substitutes clear Congressional intent, as set forth in the RCRA's statutory language, with an admittedly irrelevant regulatory definition. This Court should decline this invitation inasmuch as RCRA's legislative history firmly supports the Ninth Circuit's conclusion that "the burning of bluegrass residue in not the evil against which Congress took aim" in enacting RCRA. Pet. at A17. Respondents respectfully submit that this Court should reject Petitioner's argument.

II. The Ninth Circuit's Opinion Is Consistent With The RCRA Jurisprudence of Other Circuit Courts of Appeal and Creates No Conflict Between the Circuits

A. The Ninth Circuit's Opinion is wholly consistent with RCRA's clear statutory language and does not conflict with the decisions of any other Circuit Court of Appeal. While Petitioner asserts that "growing confusion" exists in the courts of appeal regarding the meaning of solid waste as applied to recycled materials under RCRA, review of the cited authorities does not support this contention.[15] Each opinion addresses narrow issues that are specific to the facts of each case and most are also premised upon interpretation of EPA's inapplicable hazardous waste regulations. Despite these factual dissimilarities, the Ninth Circuit's opinion is consistent with any broad principles regarding RCRA "solid wastes" expressed by the various circuits.

The Ninth Circuit evaluated whether the Growers' reuse of their stubble and straw fell within the statutory definition of a

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15. Many of the authorities Petitioner cites in support of its claim that a circuit split exists were also cited by the Ninth Circuit in its opinion.

solid waste and concluded that it did not, finding that the Growers presented:

> undisputed evidence that [they] reuse the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass. . . . The bluegrass is not discarded, abandoned or given up and it does not quality as "solid waste" under RCRA, based upon its statutory definition of "solid waste" as "discarded material.

Pet. at A15.

In support of its holding, the Ninth Circuit cited opinions from the District of Columbia, Eleventh and Second Circuits.[16] *See e.g. AMC I, AMC II, Battery Recyclers* and *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993); *Connecticut Coastal Fishermen's Assn. v. Remington Arms Co., Inc. et al.*, 989 F.2d 1305 (2d Cir. 1993). Petitioner claims that the Ninth Circuit's opinion stands in conflict with the opinions of no less than *five* other circuit courts of appeal, because it concluded that material can be "destroyed without being 'discarded' if it is beneficial to destroy material that would otherwise be harmful." Pet. at 25. Petitioner further argues that the Ninth Circuit erred because these allegedly recycled materials have some "economic 'benefits' to the recycler." *Id.*

These arguments do not accurately reflect the holdings of the Ninth Circuit or any other Circuit Court of Appeal. None of the cases cited by Petitioner involve stubble, straw, or any form of agricultural materials or address non-hazardous materials that were continuously used by the original owner as part of its production process. All of the cases cited by the Petitioner concern hazardous or recycled materials that were discarded by the original consumer or those materials that were deemed

16. Petitioner's citation to the same authorities in support of its claim that a circuit split exists is perplexing. As discussed more fully *infra*, those opinions are all legally consistent with and factually distinguishable from this action.

abandoned based upon the lengthy period that their owners did not use them. In this matter, which did not involved recycled materials or hazardous waste, the undisputed evidence established that the Growers *used* the stubble or straw as part of a continuous growing process and did not discard it.[17]

The Petitioner, like the Ninth Circuit, correctly noted that the District of Columbia Circuit has addressed the definition of solid waste under RCRA more frequently than any other Circuit Court of Appeal. The Ninth Circuit's opinion is consistent with all of the RCRA's decisions issued by the D.C. Circuit, including its opinion in *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003). In *Safe Food*, the D.C. Circuit reaffirmed its earlier holdings in *AMC I* and *Battery Recyclers*, holding that "the term 'discarded' cannot encompass materials that 'are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.' *Id.*, 350 F.3d at 1268.

The authorities cited by Petitioner do not support its claim that a split in the circuits exists. For example, Petitioner's reliance on *Battery Recyclers* is misplaced. In *Battery Recyclers*, the D.C. Circuit addressed a challenge to regulations that defined residual or secondary materials generated in mining and mineral processing operations as "solid waste" and affirmed its holding in *AMC I*. 208 F.3d at 1052. In a unanimous opinion, the D.C. Circuit found that EPA had not properly defined "'solid waste' when it had concluded that 'discarded material' included 'any material which is *Abandoned* . . . or *Recycled*'". *Id.* at 1050.

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17. Petitioner's repeated references to recycled materials constitutes a *de facto* invitation to this Court to review the entirety of the hazardous waste regulations governing recycled materials. However, those regulations are not applicable to the issues raised in the Petition. Although the recycler has found a "treasure" in another man's "trash," to be recycled, they must first have been disposed of. In this case, the Growers, at all times, value and retain their straw and stubble and maintain it within their exclusive possession for continuous use as part of the growing process. Accordingly, it does not fall under the statutory (or regulatory) definition of solid waste.

> [Petitioners] ask how secondary material held for recycling in production could possibly qualify as "waste" when the statute defines "waste" as "discarded materials" 42 U.S.C. § 6903(27).

Id. at 1051.

The D.C. Circuit, noting that the question was not a new one, rejected EPA's attempts to limit *AMC I* to "immediate reuse." *Id.* at 1052-53. It also rejected EPA's arguments that *API* and *AMC II* extended RCRA's reach to materials that were not discarded. The Court of Appeals succinct conclusion is likewise applicable to this matter:

> [A]t least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away. Once again, "by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent," 824 F.2d at 1193, because it has based its regulation on an improper interpretation of "discarded" and an incorrect reading of our *AMC I* decision.

Id. at 1056. Accordingly, to be regulated under RCRA, a material must be discarded by the generator before RCRA applies.

Petitioner's reliance upon *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993), for the proposition that recycled materials constitute solid wastes regulated under RCRA is incorrect because ILCO is factually distinguishable from this matter. The defendant in ILCO was a lead smelter that *purchased* spent car batteries *for recycling purposes*. While the Eleventh Circuit, in *ILCO*, concluded that reclaimed lead parts from vehicle batteries were not exempt from regulation under RCRA, that determination turned on

the fact that the materials were discarded by the original consumer and reclaimed by the defendant. The Eleventh Circuit stated that that "*[p]reviously discarded* solid waste, although it may at some point be recycled, nonetheless remains solid waste." *Id.* at 1132 (emphasis added).

In the present case, the Growers, at all times, were the original owners and retained exclusive ownership and control over the bluegrass stubble and straw at issue in this matter. The ILCO court's finding that "[s]*omebody* has discarded the battery" was central to its conclusion that EPA has authority to regulate those materials which were discarded prior to ILCO's purchase. EPA's authority to regulate those materials is clear, as the batteries were already a part of the nation's waste problem that RCRA was designed to address. Second, EPA sought to regulate the lead and cadmium, which exhibit toxicity characteristics that render them hazardous pursuant to 40 C.F.R. § 261.2, its *hazardous waste regulations.*[18] As discussed *infra*, those regulations are inapplicable to bluegrass stubble and straw, neither of which is hazardous.

The stubble and straw in question are materials retained for immediate reuse "in a continuous stream or flow from one production process to another." *AMC I*, 824 F.2d at 1190. "Previously discarded solid waste, although it may be recycled at some point, remains solid waste." *ILCO*, at 996 F.2d at 1132. To the contrary, materials which are never

18. Although EPA has promulgated regulations under RCRA which list specific hazardous *wastes* by listing and by characteristics, it cannot regulate any materials under RCRA unless they are solid wastes. For example, lead batteries, while in the possession of the original consumer and during its useful life, are not solid wastes under RCRA, notwithstanding their toxic characteristics. However, once a spent car battery loses its utility and is left by its undoubtedly unhappy owner with a mechanic or by the roadside, it has been discarded or abandoned and only then constitutes a hazardous solid waste regulated under RCRA.

discarded, but used as part of a continuous process, are not. Pet. at A18. Thus, the Ninth Circuit's opinion that the Growers' bluegrass straw and stubble is neither discarded nor recycled is entirely consistent with *ILCO*.

Petitioner also relies upon *Connecticut Coastal* in support of its claims that a split exists among the circuits. Pet. at 19, 21. In *Connecticut Coastal*, the owners of a trap and skeet club were deemed to have "discarded" the lead shot and clay targets which were, at one time, used by its members. 989 F.2d at 1308. The Second Circuit noted that the shot and targets, after serving their intended purposes, had been left to accumulate in Long Island Sound as much as *70 years*. *Id.* While the Second Circuit did not determine how long materials must accumulate before they become discarded, the Growers in present case burn the straw and stubble days or weeks after the seeds are harvested as part of a continuous process of growing bluegrass.[19] *Id.* at 1316. While the facts of *Connecticut Coastal* are readily distinguishable from this action, the Second Circuit's holding is consistent with that of the Ninth Circuit's opinion in this matter. No comparison can be made between discarded lead shot that was abandoned for decades with stubble and straw that is continuously used by the Growers.

Despite Petitioner's' claim to the contrary, the Ninth Circuit's decision is consistent with **all** of the opinions issued by other circuits. The Ninth Circuit's opinion, which was premised upon the *undisputed* findings that the Growers did not discard or abandon their straw and stubble, is also

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19. Under circumstances entirely different from this action, other materials clearly are discarded. *See Owen Electric Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994) (slag generated as a byproduct of steel production which remained untouched for six months or more before it was *sold* to other entities was held to be "discarded" when it had was not destined for beneficial reuse or recycling a continuous process by generating industry itself).

factually distinguishable from those cases. The Growers' use of the straw and stubble is entirely distinct from the (1) hazardous petroleum products at issue in *Am. Petroleum Inst. v. EPA*[20], 906 F.2d 729 (D.C. Cir. 1990), which were held to be "indisputably 'discarded' *before* being subject to metals reclamation" by another industry, (2) the previously discarded batteries in *Assn of Battery Recyclers*, (3) the lead shot and clay targets left in Long Island abandoned for decades after serving "their intended purpose " in *Connecticut Coastal*, and (4) the slag which sat for six months before being sold to another entity in *Owen Elect.*

The bluegrass stubble and straw, like the fertilizer in *Safe Food*, is used by the Growers for their intended purposes and are neither abandoned nor discarded nor destined for recycling or reclamation in another industry. *See No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148 (2[d] Cir. 2001) (City did not "discard" insecticides when it sprayed them into air with design of effecting their intended purpose of reaching and killing mosquitoes and their larvae). Instead, the straw and straw is used by the Growers as part of a continuous process of the growing of Kentucky bluegrass and is never discarded. "Material is not discarded until after it has served its intended purpose. *Id.* at 149. Accordingly, none of the authorities cited by Petitioner's supports its assertion that the Ninth's Circuit's opinion creates a conflict among the various circuits.

As no circuit conflict exist, the Petition should be denied.

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20. In *Am. Petroleum*, the Court of Appeals reaffirmed *AMC I* and vacated portions of an EPA regulation that determined that oil-bearing wastewaters were solid waste for purposes of RCRA. The Court held that "[l]egal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances." *Id.* at 57. The intent of the generator is thus critical.

III. The Ninth Circuit's Opinion Has Created No Loophole in Enforcement of RCRA's Hazardous Waste Regulations

A. EPA's Hazardous Waste Regulatory Definition of Solid Waste Is Inapplicable to This Matter Because Neither Stubble Nor Straw Is Hazardous.

Petitioner asks this Court to apply the highly specific definitions set forth in RCRA's *hazardous waste* regulations into a matter governed under the more general scheme set forth in RCRA itself. Petitioner argues that a broad loophole in RCRA enforcement has been created by the Ninth Circuit's opinion. Both arguments are meritless as RCRA's hazardous waste regulations are inapplicable to this action and because the Ninth Circuit's opinion is a narrow one which is expressly limited to the facts presented.

EPA's hazardous waste regulations have "extremely technical and precise distinctions," and are admittedly inapplicable to this case. Pet. at 6.[21] EPA's regulatory authority under RCRA Subtitle C extends only to the regulation of hazardous waste, which is defined as a subset of solid waste. Under subtitle C, "the scope of EPA's jurisdiction is limited to those materials that constitute 'solid waste.'" *AMC I*, 824 F.2d at 1179 (citation omitted). Because the Growers' straw and stubble fall outside of the definition of solid waste, RCRA's hazardous waste regulations are entirely irrelevant to this matter and all of Petitioner's arguments and inferences should be disregarded.[22]

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21. Petitioner admits that EPA's recycling regulations exist "only for the purposes of administration of RCRA's hazardous waste program." Pet. at 5.

22. Petitioner asks this Court to look to EPA's hazardous waste regulations for guidance, despite the undeniable inapplicability of those regulations. Title 40, Part 261 of the Code of Federal Regulations, is (Cont'd)

Petitioner ignores that the Ninth Circuit's determination that the straw and stubble were not solid wastes was central to its analysis. The Ninth Circuit concluded, based upon the undisputed evidence and the unambiguous statutory definition of "solid waste," that the Growers' bluegrass straw or stubble was used as part of a continuous process of the production of Kentucky bluegrass and was therefore outside of RCRA's purview. It did not rely upon any definitions set forth in EPA's hazardous waste regulations.

Petitioner relies upon RCRA's hazardous waste regulations to support its contention that the Ninth Circuit was incorrect in concluding that the burning of the Growers' bluegrass straw and stubble did not constitute disposal of a solid waste. Petitioner's arguments miss the mark as neither the District Court nor the Ninth Circuit relied upon RCRA's regulatory definitions. By asking this Court to ignore RCRA' unambiguous statutory definition of solid waste and substitute it with an admittedly inapplicable regulatory one, Petitioner seeks to substitute the explicit intent of Congress and relevant case law with definitional information contained in irrelevant regulations. Petitioner's request should not be granted.

Petitioner attempts to overcome the flaw in its arguments by making general references to RCRA's overriding purpose

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(Cont'd)

entitled "Identification and Listing of *Hazardous Waste*" (emphasis added), and is by definition, inapplicable to both non-hazardous solid waste and therefore to this action.

> The definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled.

40 C.F.R. § 261.1(b)(1).

of protection of human health and the environment; however, this approach ignores two independent but critical points. First, Petitioner ignores that public health protection references in RCRA are general in nature and do not impose specific duties on individuals. To the contrary, RCRA's statutory definition of solid waste is clear and strictly controls judicial interpretations thereof. *See Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988). While Petitioner appears to claim that a conflict exists between the specific statutory definition of solid waste and RCRA's general goal of protection of public health, a review of the text of RCRA leads to the inescapable conclusion that no such conflict exists. *See Gallenstein v. United States*, 975 F.2d 286, 290 (6th Cir. 1992) (the general rule that the specific governs the general "does not apply when the plain language of the two subsections can be reconciled without need for the application of a general rule."). Even if a conflict does exist, the specific statutory definition of solid waste would control over the general goal of public health protection. *Id.* Petitioner also ignores that neither the District Court nor the Ninth Circuit concluded that the burning of bluegrass straw or stubble presents a danger to health or the environment.

Congress specifically declared that "agricultural products that could be recycled or reused as fertilizers were *not* its concern," because it is "not a part of the discarded materials disposal problem" RCRA was designed to address. Pet. at A17. The Ninth Circuit concluded that the Growers' stubble and straw was "not the type of material Congress intended to proscribe under RCRA." Pet. at A16

Petitioner ignores the fact that EPA has never found that the Growers have violated RCRA. The reasons for such administrative conclusions are clear. First, the practice of field stubble burning is not new; rather, it is a long-standing agricultural practice utilized by farmers in virtually every state. Second, field burning is and has been strictly regulated

in north Idaho by the Idaho Department of Agriculture (ISDA) and the Idaho Department of Environmental Quality (IDEQ) pursuant to the Idaho State Implemental Plan (SIP) promulgated under the Clean Air Act and the Idaho Smoke Management Act. Idaho Code § 22-4801 *et seq.*

Petitioner's argument that the Growers' use Kentucky bluegrass stubble and straw "in a matter constituting disposal" is unsupported by the record and is entirely dependent upon application of the inapplicable regulatory definition of "disposal" set forth in EPA's hazardous waste regulations. Petitioner also ignores the factual findings made below which demonstrate that the Growers' burning of bluegrass stubble and straw are an integral part of the process of growing bluegrass in north Idaho. Pet. at A39. Petitioner ignores the testimony of its own witnesses, which supported the lower court's findings that the straw and stubble did not constitute a solid waste. For example, Petitioner's star witness, former grower Don Jacklin, admitted that the value of burning to the production, panting and harvesting of Kentucky bluegrass in North Idaho was irreplaceable. *Id.* at A13. Paul Meints, one of Petitioner's experts, admitted that open burning of the stubble and straw acts as a fertilizer and restored nutrients to the fields. *Id.* at A13-14.

Petitioner cites to 40 C.F.R. § 261.2(c) in support of its claim that the Growers recycle the bluegrass straw and stubble simply burning it. No support exists for the claim that the straw and stubble are being recycled. To the contrary, the entirety of the evidence demonstrated that the stubble and straw are used as part of a "continuous process of growing bluegrass," that the Growers did not discard it and that burning was required given the atmospheric conditions, elevation and the poor, rocky soils in north Idaho. Pet. at A12. Petitioner's arguments also fail even when applying the regulatory definitions set forth in 40 C.F.R. § 261.2(e)(i), inasmuch as the District Court and the Ninth Circuit correctly

concluded, based upon undisputed evidence, that the Growers used the stubble and straw. The record is entirely devoid of any allegations or evidence that the Growers recycled it. Accordingly, even assuming *arguendo* that RCRA's hazardous waste regulations were applicable to the burning of Kentucky bluegrass straw and stubble, Petitioner's argument fails inasmuch as the stubble and straw is excluded from the regulatory definition of solid waste.

Finally, Petitioner's relies upon inappropriate regulatory definitions applicable to recycled hazardous wastes that are placed onto land. This argument is equally meritless because neither the stubble nor straw nor the smoke that results from its burning is recycled or constitute waste. "The burning of bluegrass residue by farmers is not the evil against which Congress took aim" in enacting RCRA. Pet. at A17.

In sum, the Petition fails to present any compelling reason why this Court should grant a Writ of Certiorari. Petitioner relies upon regulations that are inapplicable to the materials at issue in this matter. The District Court and the Ninth Circuit properly rejected Petitioner's arguments after concluding that the entirely of the evidence established that the Growers used their stubble and straw and did not discard or abandon it.

B. The Ninth Circuit's Opinion Creates No Loophole In Regulating Hazardous Wastes

Petitioner contends that the Ninth Circuit's opinion creates a loophole that will prevent EPA from enforcing RCRA's *hazardous waste* regulations. Although Petitioner devotes much of the Petition to this argument, it is unsupported and its concerns are entirely unfounded. First, the Ninth Circuit opinion is extremely narrow and is based upon its holding that "in these circumstances of Kentucky bluegrass farming, grass residue customarily used in the farming cycle is not 'solid waste' under RCRA." Pet. at A19

n.14. The Ninth Circuit's opinion is entirely consistent with the opinions of its sister circuits and given the narrow set of facts upon which it is based, it is highly unlikely that it can be construed broadly.

Second, the Ninth Circuit's opinion did not refer to or address EPA's hazardous waste regulations and nothing in the opinion is applicable to the hazardous waste regulatory scheme. Moreover, to be regulated under RCRA, users of hazardous materials, like users of non-hazardous materials, must have discarded those materials. Absent discard, those materials are simply not yet and may never be part of the nation's "waste disposal problem" Congress sought to cure in enacting RCRA.

Third, Petitioner's argument that entities "engaged in classic waste disposal activities" will use the shelter provided by the Ninth Circuit's opinion to avoid "any RCRA regulation" is highly speculative, has not resulted in a wave of unregulated waste disposal activities to surge across the land, and is not remotely likely to occur in the future. Petitioner has failed to identify a single instance where an entity otherwise subject to RCRA's hazardous waste regulations has even argued that the Ninth Circuit's opinion effectively deprives EPA of the power to enforce its hazardous waste regulations.

Hazardous materials that are used by its original owner will continue to be materials which are not "solid wastes" and therefore not governed by RCRA. Materials that are discarded, irrespective of whether they are hazardous or recycled by another industry, will continue to be deemed solid wastes and remain subject to RCRA's dictates. The Ninth Circuit's opinion does not depart from established RCRA jurisprudence governing solid *or* hazardous wastes.

CONCLUSION

Petitioner failed to establish any compelling basis for the Court to issue a Writ of Certiorari in this matter. The Ninth Circuit's reasoning is consistent with all decisions and authorities interpreting the meaning of solid waste under RCRA. There is no conflict among the various circuits on any issue raised in this matter. Additionally, no element of the Ninth Circuit's opinion will interfere with EPA's ability to enforce its regulations regarding hazardous waste because the materials at issue, Kentucky bluegrass straw and stubble, do not qualify as either solid or hazardous waste under RCRA. Petitioner has not and cannot identify even a single instance in which EPA's ability to protect the public's health under RCRA has been compromised (or is likely to be in the future) by the Ninth Circuit's decision. In summary, there is no compelling issue of law or of public policy that supports any rationale under which this Court should issue a Writ of Certiorari. Respondents respectfully request that the Petition be denied.

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No. 04-1055

In The Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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American Mining Congress v. EPA,
824 F.2d 1177 (D.C. Cir. 1987) 4, 5

American Mining Congress v. EPA,
907 F.2d 1179 (D.C. Cir. 1990) 4

City of Chicago v. Environmental Defense Fund,
504 U.S. 906 (1992) 9

International Paper Co. v. Ouellette,
475 U.S. 1081 (1986) 9

United States v. Marine Shale Processors,
81 F.3d 1361 (5th Cir. 1996) 8

United States v. Self,
2 F.3d 1071 (10th Cir. 1993) 8

Statutes and Regulations:

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* 6

Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* 6

Resource Conservation and Recovery Act (RCRA),
42 U.S.C. § 6901 *et seq.* ..... *passim*

§ 6903(27) 1, 7

§ 6924(n) 6

§ 6972 ..... 2, 7

40 C.F.R. §§ 261.4(b)(2)(i) 7

Miscellaneous

H.R. Rep. 94-1491, 94th Cong., 2d Sess. 3 (1976) 7

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REPLY BRIEF FOR THE PETITIONER

Respondents' brief in opposition strives mightily for thirty pages to obfuscate the enormity of the Ninth Circuit's misconstruction of the plain meaning of the jurisdictional terms "solid waste" and "discarded material" within the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903(27). Respondents repeatedly insist that the "undisputed" and "uncontroverted" evidence below was that their open field burning of crop residue was a "continuous part of the growth process." See, *e.g.*, Br. in Opp. i, 11, 13, 15, 16, 19 & n.17. Yet neither the "undisputed" nature of the evidence nor their proffered "continuous process" label renders this case any less deserving of this Court's review. Just the opposite. The undisputed nature of the underlying evidence simply underscores the factually-unencumbered nature of the legal issue presented. And, respondents' "continuous process" legal theory simply confirms the extent to which the decision below cannot be squared with the plain meaning of the statutory language and would upset EPA's longstanding interpretation of the term "discarded" in its hazardous waste regulations. For,

under respondents' proffered theory, any industrial activity can avoid RCRA regulation by destroying residual materials on-site within weeks of their generation. The economic value of getting rid of the material would, like the crop residue in this case, render the material's destruction a "continuous part of the [industrial] process." Because the validity of respondents' claim raises an important legal issue about which the federal courts of appeals are now in conflict, and does so in a case that highlights the immediate and compelling public health effects at stake, the petition should be granted.

1. Respondents' brief in opposition is riddled with errors,[1] but they are absolutely correct about one thing: the "undisputed" and "uncontroverted" nature of the evidence in this case. There is no dispute that after

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[1] For instance, respondents twice intimate (Br. in Opp. 5 n.5, 26) that the lower courts found that petitioner failed to prove the existence of an imminent and substantial endangerment. Respondents also fault (*id.* at 26) petitioner for purportedly "ignor[ing] the fact that EPA has never found that [respondents] have violated RCRA." Both arguments lack merit. Neither court below found the absence of an imminent and substantial endangerment. The exclusive basis of each court's decision was instead its holding that petitioner could not bring an action under Section 7002, 42 U.S.C. § 6972, no matter how strong a showing of such an endangerment, because the crop residue being burned was not a "solid waste" as a matter of law. See Pet. App. A19, n. 15, A44. The trial court expressly added that "the Court is not finding the smoke is not a pollutant or a cause of the health problems affecting the citizens in the area" and acknowledged that petitioner had offered evidence that existing air quality standards "may not adequately protect the public's health." *Id.* at A43, A44-A45. Respondents' additional reliance on the absence of an EPA finding of a RCRA violation ignores the essential function of 7002. By its express terms, the applicability of Section 7002 does not turn on any such violation. It provide citizens with judicial relief from imminent and substantial endangerments without the necessity of demonstrating an independent violation of a specific statutory requirement of RCRA or any other law. Congress understood that gaps in statutory implementation and enforcement would invariably arise, notwithstanding the seemingly comprehensive nature of federal and state environmental protection law. The congressional purpose in enacting Section 7002 was accordingly to provide the public with the judicial avenue necessary to secure emergency relief in the most exigent of circumstances. See Pet. 24.

harvesting the commercial seed, respondents dump massive amounts of crop residue on open fields. There is likewise no dispute that they leave that residue on the fields for "weeks" until they burn it. See Br. in Opp. 22. Nor is there any factual dispute that the primary and overriding economic benefits of that process of material destruction result from getting rid of the crop residue. Significantly, in this respect, respondents never dispute our central assertion throughout the petition (Pet. 2, 8, 14), introduced in the question presented, that "99.9 percent of the reason for the burning was to get rid of [the crop residue] because the material would otherwise harm crop productivity." Pet. i.

So too, we did not dispute in the petition (Pet. 16), and do not dispute in this reply, respondents' factual assertion (Br. in Opp. 6) that the burning of the crop residue increases "the productive life of a bluegrass field." Of course it does. Getting rid of the material most certainly does "expose the plant crown to sunlight, air, and moisture" by eliminating the residue that would otherwise block sunlight and rain. *Id.* Getting rid of the material does "reduce parasitic bug infection," "reduce the growth of fungi," "reduce weed growth," and "reduce the rodent population." *Id.* But here again, it accomplishes these "benefits" by eliminating crop residue that would otherwise provide a habitat for parasitic bugs to spread, fungi to grow, and rodents to seek shelter.

As demonstrated in the petition (Pet. 14-17), the mere fact that getting rid of material is economically valuable does not mean that the material is not being "discarded." Indeed, were the rule otherwise, virtually any classic waste disposal activity would fall outside the plain meaning of "discard." There is always an economic advantage to getting rid of waste material. After all, that is why businesses get rid of it.

2. Equally unpersuasive is respondents' attempt to escape RCRA's plain meaning by characterizing its open field burning of crop residue as akin to a "continuous industrial process." See Br. in Opp. 3, 11, 13, 19 n.17. Specifically, respondents contend that the crop residue is "used by [respondents] as part of a continuous process of

the growing of Kentucky bluegrass and is never discarded." *Id.* at 23.

RCRA's protections cannot be so easily evaded by rhetorical legerdemain. All ongoing industrial activity is "continuous." And, all industrial activity, just like that of respondents in this case, requires classic waste disposal activity as part of its continuous industrial process. Otherwise, the waste material being generated would, just like respondents' crop residue, impede the ongoing industrial activity. But the continuing need to discard waste material in any ongoing business, whether by burning or otherwise, does not immunize that solid waste from RCRA regulation.

Instead, as elaborated by the petition (Pet. 5-6, 18-19, 20-23), EPA reached just the opposite conclusion in construing the meaning of "solid waste" and "discarded material." EPA rejected a broad exemption for on-site reuse and recycling of secondary materials. EPA has instead created only a very narrow exception from RCRA regulation for certain kinds of "continuous industrial processes," typified by closed loop industrial processes that immediately reuse those secondary materials as effective substitutes for raw materials. See, *e.g.*, American Mining Congress v. EPA, 824 F.2d 1177, 1185 (D.C. Cir. 1987); American Mining Congress v. EPA, 907 F.2d 1179, 1186 (D.C. Cir. 1990). While substantial uncertainty persists in the application of that narrow regulatory exception to certain types of industrial processes (Pet. 28 & n.24), there is no such ambiguity concerning its inapplicability to respondents' activity. Under EPA's regulations, burning for material destruction falls completely outside any possible exclusion. And, in no manner can *open* field burning be equated with a *closed* loop, particularly because the justification for the latter's regulatory exclusion is the absence of ambient environmental risks created by activities that are "closed." See Pet. 6. By contrast, as illustrated by the facts of this case, open field burning creates the kind of adverse spillover effects that trigger the need for regulatory oversight. As the petition explains (Pet. 6), EPA has expressly classified such activities, regardless of their

recycling nature, as waste disposal activities subject to RCRA.

3. Respondents' invocation of a purported "continuous process" exclusion also reveals the hypocrisy of their repeated claim that the meaning of "solid waste" as applied to EPA's hazardous waste program is "inapplicable" and "entirely irrelevant" to this action. Br. in Opp. 17, 24, 25. Respondents' exclusive support for their theory of a "continuous process" exclusion is, in fact, court of appeals opinions reviewing the merits of EPA's hazardous waste regulations in general and their definition of "solid waste" and "discarded material" in particular. Hence, respondents argue that the D.C. Circuit's ruling in *American Mining Congress v. EPA*, 824 F.2d 1177 (1987) that certain kinds of continuous industrial processes fall outside the scope of EPA's regulatory definition of discarded material is "*applicable* to this matter." Br. in Opp. 20 (emphasis added).

As described above, respondents are incorrect in their effort to apply EPA's narrow regulatory exclusion to their open field burning, but they are completely correct in their acknowledgment of the relevance of the Ninth Circuit's ruling to the scope of EPA's hazardous waste regulation.[2] As the brief in opposition concedes (Br. in Opp. 4 n.4), "if a substance is not a solid waste, it cannot be a hazardous waste." For this reason, as the petition explains in detail (Pet. 14-25), the Ninth Circuit's narrow interpretation of the plain meaning of the statutory definition of "solid waste" necessarily implicates EPA's jurisdiction over

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[2] Respondents' reliance on the fact that the Ninth Circuit "did not rely upon any definitions set forth in EPA's hazardous waste regulations" is likewise misplaced. See Br. in Opp. 25, 29. The Ninth Circuit did not cite directly to those hazardous waste regulations, but the court of appeals certainly acknowledged their legal relevance. The court repeatedly cited and discussed several court of appeals decisions in which the only issue was the validity of EPA's regulatory definition of "discarded material" in its hazardous waste program. See Pet. App. A9-A12. The Ninth Circuit characterized these judicial decisions concerning the meaning of solid waste as applied in EPA's hazardous waste program as "helpful" and "relevant" to its analysis. *Id.* at A9, A12.

hazardous wastes. If, as the Ninth Circuit ruled and respondents continue to argue, the plain meaning of "discarded material" cannot extend to material destruction that occurs on an ongoing and continuous basis, much of EPA's ability to regulate classic hazardous waste treatment and disposal will be eliminated.[3]

4. Implicitly acknowledging the weakness of the rulings below, respondents alternatively argue (Br. in Opp. 1, 3-5, 26) that their open field burning falls outside of RCRA either because the resulting air pollution is exclusively regulated by the federal Clean Air Act or because Congress somehow exempted the "[a]ge-old practice of agricultural burning" from RCRA regulation. Neither claim, however, stands as an obstacle to review because neither served as a basis for the ruling below. But, in all events, both lack merit.

First, as explained in the petition (Pet. 23-24), RCRA contains no such statutory exclusion for activities potentially subject to Clean Air Act air emissions controls. Not only does RCRA itself independently regulate air emissions of certain waste management activities such as incineration (see 42 U.S.C. § 6924(n)), but Congress demonstrates elsewhere in RCRA that it knows how to make clear its intent to exclude from the RCRA definition of "solid waste" specific activities regulated by another federal environmental protection law. See 42 U.S.C. § 6903(27) (excluding from "solid waste" certain material permitted under the Clean Water Act).

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[3] As the petition also explains (Pet. 22-23), the fact that EPA has made clear that its regulatory definition of "solid waste" is narrower in the hazardous waste context than it is for the statute as a whole does not, contrary to respondents' assertion, make the ruling below less significant. While a narrow construction of EPA's regulatory definition would not necessarily affect the broader meaning of the statutory definition of solid waste, a narrow construction of the statutory definition of solid waste does necessarily control and limit the reach of the regulatory definition. In this case, the court of appeals did just that; by narrowly construing the plain meaning of the statutory definition of "solid waste," the court has necessarily curbed EPA's authority to define solid waste within its hazardous waste program as well.

Nor does RCRA contain the exemption for agricultural activity claimed by respondents.[4] Although respondents twice (Br. in Opp. 5, 26) appear to be quoting from Congress in stating that "Congress specifically declared that 'agricultural products that could be recycled or reused as fertilizers were *not* its concern,'" those are not Congress's words. The quoted language is nothing more than the court of appeals' characterization of one sentence in a legislative report. See Pet. App. A17. When, moreover, Congress in fact spoke in the only manner that it authoritatively can – in the words of the statute itself – Congress left no doubt that no such agricultural exemption exists. RCRA expressly defines the meaning of "solid waste" as "discarded material" including material from "agricultural operations." 42 U.S.C. § 6903(27). In all events, as explained in the petition (Pet. 17-18), EPA's authoritative regulations make quite clear the Agency's view that secondary material generated by "[t]he growing and harvesting of agricultural crops" and then "returned to the soil as fertilizers" is a "solid waste." See 40 C.F.R. § 261.4(b)(2)(i).[5]

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[4] Of course, not all agricultural burning triggers RCRA Section 7002 oversight. It occurs only where, as here, the extreme nature of that burning produces an imminent and substantial endangerment. In this case, the severity of the public health crisis facing residents of Northern Idaho and those in neighboring States downwind of respondents' open field burning is underscored by the filing of two amicus briefs supporting the petition. The first is by the Idaho Medical Association, representing 1800 medical care professionals, including 1600 physicians, and the second is by the American Lung Association, the nation's oldest voluntary health organization. See Amicus Curiae Br. Idaho Medical Org.; Amicus Curiae Br. American Lung Ass'n.

[5] EPA, therefore, has rejected the sweeping significance given by the Ninth Circuit to House Report language that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." Pet. App. A17, quoting H.R. Rep. 94-1491, 94th Cong., 2d Sess. 3 (1976). But the lower court's reading was in all events clearly misguided because the report language does not even purport to speak to the status of materials not returned to the soil but instead, as here, burned, causing massive plumes of smoke. The resulting particulate matter entering human lungs is in no sense "returned to the soil as fertilizers."

5. Finally, respondents' attempt to establish the absence of a circuit conflict is unavailing. As demonstrated by the petition (Pet. 25-28), the Ninth Circuit's adoption of a broad exclusion to the plain meaning of "solid waste" for on-site material reuse and recycling creates a wide and deep circuit conflict. It is no matter that none of the cases that the petition cites "involve stubble, straw, or any form of agricultural materials." Br. in Opp. 18. Nor does it disturb the existence of a circuit conflict that the cases, unlike this one, generally involve hazardous wastes. The Ninth Circuit's ruling of law, promoted here by respondents' assertion of a statutory exclusion for on-site waste management activities conducted on a "continuous" basis, is not limited in its application to stubble or straw. It would equally apply to all industrial and manufacturing processes similarly susceptible to such a "continuous" label. Because, moreover, the legal ruling would necessarily extend to the application of RCRA's hazardous waste management program, it would directly conflict with the rulings of courts of appeals that, consistent with EPA's regulations, have denied the existence of any such statutory exclusion, such as *United States v. Marine Shale Processors*, 81 F.3d 1361 (5th Cir. 1996) and *United States v. Self*, 2 F.3d 1071 (10th Cir. 1993), which respondents fail even to cite, let alone discuss.

Indeed, for this same reason, respondents are completely mistaken in asserting that "[p]etitioner has not and cannot identify even a single instance in which EPA's ability to protect the public's health under RCRA has been compromised (or is likely to be in the future)." Br. in Opp. 30. Not so. As set forth in the petition (Pet. 5-6, 21-23), EPA long ago concluded that its ability to protect the public health and the environment from the dangers presented by solid and hazardous waste was entirely dependent on its authority to interpret RCRA's definition of "solid waste" as "discarded material" as extending to a broad class of material reuse and recycling activities that presented such risks. EPA further identified the activity of burning material for its destruction or its use as "fuel" as paradigmatic examples of the kind of activity that falls

within the core of the Agency's authority under RCRA. By completely undermining EPA's authority in this fundamental respect, it cannot fairly be gainsaid that "EPA's ability to protect the public's health has been compromised."

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.[6]

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[6] As stated in the petition (Pet. 30 n.25), because of the implications of the lower court's ruling for RCRA, the Court might also invite the Solicitor General to file a brief expressing the views of the United States on the question presented either after granting the petition (see International Paper Co. v. Ouellette, 475 U.S. 1081 (1986)) or instead to assist the Court's decision whether to grant the petition in the first instance (see City of Chicago v. Environmental Defense Fund, 504 U.S. 906 (1992)).

(3)

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BRIEF OF *AMICI CURIAE* THE AMERICAN LUNG ASSOCIATION AND THE AMERICAN LUNG ASSOCIATION OF IDAHO/NEVADA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF INTEREST.....1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PARTICULATE POLLUTION FROM OPEN BURNING OF AGRICULTURAL WASTES POSES A SEVERE HEALTH HAZARD, ESPECIALLY TO VULNERABLE POPULATIONS SUCH AS CHILDREN, THE ELDERLY, AND THOSE WITH RESPIRATORY DISEASES. 4

II. THE DECISION BELOW IS INCONSISTENT WITH RCRA'S PLAIN LANGUAGEAND PURPOSES AND PRECEDENT FROM OTHER CIRCUITS AND THREATENS TO UNDERMINE ONE OF THE MOST IMPORTANT STATUTORY PROTECTIONS FOR PUBLIC HEALTH 9

III. THE ABSENCE OF REMEDIES UNDER STANT LAW HIGHLIGHTS THE IMPORTANCE OF RCRA SECTION 7002 AS A MEANS TO PROTECT PUBLIC HEALTH..... 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

American Petroleum Inst. EPA, 906 F.2d 729 (D.C. Cir. 1999). 12

Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) 2

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 2

Meghrig v KFC Western, Inc., 516 U.S. 479 (1996) 10

Owen Electric Steel Co. of South Carolina v. Browner, 37 F.3d 146 (4th Cir. 1994) 12

United States Marine Shale Processors, 81 F.3d 1361 (5th Cir. 1996) 12

Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001) 2

Statutes and Regulations

40 C.F.R. 261.4(b)(2) 11

40 C.F.R. Pt. 261 11

42 U.S.C. 6972(a)(1)(B) 10

42 U.S.C. 6903(27) 11

42 U.S.C. 6972(a)(1)(B) 3

Idaho Code § 22- 4803A(6) 13

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STATEMENT OF INTEREST[1]

The American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with a national office in New York City and affiliate associations throughout the country. Founded in 1904 to fight tuberculosis, the ALA now fights lung disease in all its forms, with an emphasis on asthma, tobacco control and environmental health. The ALA is funded by contributions from the public, along with gifts and grants from corporations, foundations and government agencies.

Since the 1960s, the ALA has supported national and local initiatives to combat smoking and reduce air pollution in order to reduce these threats to lung health. Recently, the ALA led initiatives to persuade the Environmental Protection Agency to tighten to regulations to reduce ambient levels of ozone and particulate air pollution, including tighter emissions standards for diesel trucks and buses and for diesel engines used in construction and other off-road equipment. In addition to ALA's legislative, litigation, public education, and research efforts, the ALA in 2004 published its annual survey of air pollution in the United States, entitled THE STATE OF THE AIR: 2004. That study demonstrates that over 81 million people in the United States live in areas where there are dangerous levels of short-term particulate matter pollution, the form of pollution at issue (in an especially acute form) in the present case, and catalogues recent scientific research concerning the effects of such pollution on human health.

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1 Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than counsel for the amicus made any monetary contributions to its preparation or submission. Both Petitioner and Respondents consented to this filing; their letters of consent are being submitted with the brief.

The ALA has appeared in this Court as *amicus curiae* in numerous cases involving air quality and public health issues. *E.g.*, *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

The American Lung Association of Idaho/Nevada, an affiliate of the ALA through a contractual relationship, is headquartered in Reno, Nevada, with offices Las Vegas, Nevada, and Boise, Idaho. The association is dedicated to promoting lung health and preventing lung disease. In addition to work on tobacco control and asthma, the American Lung Association of Idaho/Nevada provides education and advocates for clean air and measures that reduce threats to and improve conditions for the respiratory and pulmonary health and welfare of the people in Idaho and Nevada. The association filed an *amicus* brief in the court of appeals supporting the position of petitioner Safe Air for Everyone.

SUMMARY OF ARGUMENT

In this brief, *amici* wish to highlight the severe health risks associated with the form of pollution at issue in this case: particulate pollution resulting from the open burning of Kentucky bluegrass plants after the seed for which the plants are harvested has been removed. As numerous scientific studies have demonstrated, acute exposure to fine particulate pollution like that produced by respondents' activities poses a variety of serious health problems. These include exacerbating asthma in children; increased hospitalizations for patients suffering from respiratory diseases; inflammation of lung tissue in healthy adults; increased numbers of heart attacks, especially among the elderly, and death from respiratory and cardiovascular causes. The extensive record below poignantly illustrates – in the

testimony of many treating physicians, public health experts, and dozens of North Idaho residents – the grave suffering that acute particulate pollution causes.

By any measure, the form of pollution at issue constitutes a severe health hazard – one that falls squarely within the letter and purpose of the "imminent and substantial danger" provision of Section 7002 of the Resource Recovery and Conservation Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). In addition to permitting the health hazards caused by widespread burning of bluegrass residues, the Ninth Circuit's decision in the case involves a stark misreading of one of the most important federal environmental statutes, a reading that conflicts with the decisions of numerous other courts of appeals and seriously weakens RCRA throughout the country's largest judicial circuit.

The panel majority's ruling that the bluegrass straw that respondents burn has not been "discarded" for purposes of RCRA's definition of "solid waste" – even though the conceded primary purpose of the burning is to dispose of grass residue that must be removed from fields before new crops can grow – represents a bad misreading the statute. If left in place, the court of appeals' construction could exempt from RCRA's coverage all manner of waste management practices regardless of their effects on human health, on the bare excuse that the method of disposal might be said to produce some incidental benefit other than getting rid of the waste (such as providing landfill or generating heat or power).

Section 7002 was deliberately crafted to provide a broad and flexible remedy to address extreme hazards. It does not require the identification of a violation of particular statutory or regulatory requirements, but is simply concerned with providing relief from certain extreme threats to human health and the

environment. This case, which features a severe harm to public health that has not been effectively addressed by government regulators, demonstrates Congress's wisdom in enacting such a provision. Review by this Court is warranted because the panel majority's crabbed interpretation threatens to emasculate this important tool for addressing serious public health hazards.

Finally, we observe that Idaho law provides little protection against the pollution at issue here. Respondents' practices have been effectively exempted from state nuisance law, and state regulators have proven unable to prevent burning from causing the widespread health problems documented in the record here.

ARGUMENT

I. PARTICULATE POLLUTION FROM OPEN BURNING OF AGRICULTURAL WASTES POSES A SEVERE HEALTH HAZARD, ESPECIALLY TO VULNERABLE POPULATIONS SUCH AS CHILDREN, THE ELDERLY, AND THOSE WITH RESPIRATORY DISEASES.

As the record from the proceedings in the district court vividly demonstrates, the open-field burning of bluegrass residues releases very high concentrations of particulate pollution. See Pet. App. A60. The U.S. Environmental Protection Agency has explained that particulate matter is a "mixture of microscopic solids and liquid droplets suspended in the air" and consists of a number of different components including acids, chemicals, metals, soils, dust, and allergens like pollen.[2] Particulate pollution causes a broad range of health

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[2] Particulate Pollution and Your Health, available at http://www.epa.gov/airnow/particle/pm-color.pdf (last viewed March 31, 2005);

problems:

> Short-term exposure to particle pollution can cause premature death. Those deaths can occur on the very day that particle levels are high, or within one to two months afterwards. Unfortunately, particle pollution does not just make people die a few days earlier than they might otherwise: these are deaths that would not have occurred without the pollution. Particle pollution also diminishes lung function, causes greater use of asthma medications, and increases rates of school absenteeism, emergency room visits and hospital admissions. Other adverse effects can be coughing, wheezing, cardiac arrhythmias and heart attacks.[3]

The form of open burning at issue here produces "fine" particulate matter, which presents especially serious public health problems. *E.g.*, CA App. 131-44 (declaration of Richard B. Schlesinger, PhD, concerning impacts of spikes in PM 10 and PM 2.5 as a result of bluegrass residue burning). As stated by pulmonologist David P. York, "the health impact of airborne particles increases as those particles get smaller. This is true because particles are able to pass through the natural filtration mechanisms of the upper airway and penetrate deeper into the lower airway and lungs." C.A. App. 84.[4]

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see also EPA, *Air Quality Criteria for Particulate Matter*, Vol. 1, pp. 2-2, 2-3, EPA/600/P-99-002/2aF (2004).

[3] STATE OF THE AIR 2004 at 48.

[4] See Environmental Protection Agency, *Particulate Pollution and Your Health*, available at http:// www.epa.gov/airnow/particle/pm-color.pdf (last viewed March 31, 2005) ("The size of particles is directly linked to their potential for causing health problems. Small particles less than 10 micrometers in diameter pose the greatest health problems, because they can get deep into your lungs, and some may even get into your bloodstream.");

A substantial body of recent public health research chronicles the effects of short-term increases in particulate pollution, including:

> death from respiratory and cardiovascular causes, including strokes;[5]
>
> increased numbers of heart attacks, especially among the elderly and people with heart conditions;[6]
>
> inflammation of lung tissue in young, healthy adults;[7]
>
> increased hospitalization for cardiovascular disease;[8]
>
> increased emergency room visits for patients suffering from acute respiratory ailments;[9]
>
> increased hospitalization for asthma among children,[10]

STATE OF THE AIR: 2004 at 46.

[5] See Dominici, *et al.*, *On the Use of Generalized Additive Models in Time-Series Studies of Air Pollution and Health*. 3 AM. J. EPIDEMIOL 193 (2002); Hong, *et al.*, D.C. Effects of Air Pollutants on Acute Stroke Mortality, 110 ENVIRON. HEALTH PERSPECT. 187 (2002); Tsai, et al., *Evidence for an Association Between Air Pollution and Daily Stroke Admissions in Kaohsiung, Taiwan*. 34(11) STROKE 2612 (2003).

[6] D'Ippoliti, *et al.*, *Air Pollution and Myocardial Infarction in Rome: A Case-Crossover Analysis*. *14* EPIDEMIOLOGY 528 (2003).

[7] Ghio, *et al.*, *Concentrated Ambient Air Particles Induce Mild Pulmonary Inflammation in Healthy Human Volunteers*, 162 AM. J. RESPIR. CRIT. CARE MED. 981 (2000).

[8] Metzger *et al.*, *Ambient Air Pollution and Cardiovascular Emergency Department Visits in Atlanta, Georgia, 1993-2000*, 15 EPIDEMIOLOGY 46 (2004).

[9] Van Den Eeden, *et al.*, *Particulate Air Pollution and Morbidity in the California Central Valley: A High Particulate Pollution Region*, FINAL REPORT TO THE CALIFORNIA AIR RESOURCES BOARD, CONTRACT 97-303, July 12, 2002.

[10] Lin, *et al.*, *The Influence of Ambient Coarse Particulate Matter on Asthma Hospitalization in Children: Case-Crossover and Time-series Analyses*. 110 ENVIRON. HEALTH PERSPECT. 575 (2002); Norris, *An Association Between*

and
increased severity of asthma attacks in children.[11]

The record from the proceedings below paints a striking picture of the extent of the health problems caused by smoke from respondents' burning of bluegrass stalk residues. Numerous doctors testified about the effects of the smoke on their patients. For example, Dr. John H. Strimas, who directs the North Idaho Allergy, Asthma and Immunology Center, stated that "exposure to smoke from grass residue burning frequently aggravates the existing condition of my patients with pulmonary sensitivities, pulmonary illnesses, and upper respiratory disorders" and that "the aggravation caused by smoke from residue burning is often the trigger for episodes of acute respiratory distress that range in severity from irritating and uncomfortable to dangerous and life threatening." C.A. J. R. 104. Dr. Joyce Gilbert, a pediatrician practicing in Sandpoint, Idaho, stated that:

> The adverse health effects caused by grass residue burning on children can be severe, scary, and traumatic and cause pain, suffering and panic. The effect on small children is especially bad, in that these children often do not understand what is causing their coughing and

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Fine Particles and Asthma Emergency Department Visits for Children in Seattle, 107 ENVIRON HEALTH PERSPECT 489 (1999); Tolbert *et al.*, *Air Quality and Pediatric Emergency Room Visits for Asthma in Atlanta, Georgia*, 151 AM J EPIDEMIOL. 798 (2000).

[11] Slaughter, *et al.*, *Effects of Ambient Air Pollution on Symptom Severity and Medication Use in Children with Asthma*, 91 ANN. ALLERGY ASTHMA IMMUNOL. 346 (2003). Further information about the health effects of acute particulate pollution may be found at STATE OF THE AIR, at 49; HEALTH EFFECTS OF OUTDOOR AIR POLLUTION Part 1, at 29-30; PM Criteria at 1-11, 2- 22.

> wheezing, their great difficulty breathing, and the tightness in their chest that they are experiencing. * * * Newborn babies are at even higher risk because their airways are smaller and more sensitive.

C. A. App. 62; see also C.A. App. 200. Pulmonologist Michael M. McCarthy testified that smoke from the grass residue burning "aggravates the condition of my patients with pulmonary illness" and can trigger "episodes of acute respiratory distress that range in severity from irritating and uncomfortable to dangerous and life threatening." C.A. App. 67. And Dr. Henry D. Covelli declared that "[a]s Respiratory Care Medical Director of Kootenai Medical Center in Coeur D'Alene Idaho, I have witnessed the immediate death of at least one patient who was exposed to smoke from North Idaho grass residue burning, experienced immediate respiratory difficulty, and expired as a result of an exacerbation of his respiratory disease." C.A. App. 92.

Dr Richard B. Schlesinger, an inhalation toxicologist who is a leading expert on the effects of inhaled particulate matter on the human respiratory tract, testified that:

> the adverse respiratory health impacts reported by residents of North Idaho and their treating physicians following exposure to smoke from grass field residue burning are consistent, based on my scientific expertise, with what would be expected following acute exposures to fine airborne PM, such as that emitted by agricultural burning.

CA App. 134. See also C.A. App. 131, 135, 210-18.

Testimony from individual residents of North Idaho residents painted a picture of the hardships respondents'

activities have caused for members of the public, especially for those most sensitive to particulate pollution – the young, the old, and those with respiratory diseases.[12] Trina Heisel testified that the burning forced her to take her daughter, who suffers from cystic fibrosis and who experienced "terrible" symptoms during burning season, to leave the area entirely. ER 180. Laura Fowler testified about the effects of the smoke on her asthmatic daughter, stating that it left her "[u]nable to breathe" or engage in "normal activities that a child would do, go outside, ride a bike[.]" ER 196. Lawrence Bud Moon, the 76-year-old mayor of East Hope, Idaho, testified that the smoke caused him "severe problems with breathing." ER 206.

II. THE DECISION BELOW IS INCONSISTENT WITH RCRA'S PLAIN LANGUAGE AND PURPOSES AND WITH PRECEDENT FROM OTHER CIRCUITS AND THREATENS TO UNDERMINE ONE OF THE MOST IMPORTANT STATUTORY PROTECTIONS FOR PUBLIC HEALTH.

Section 7002 of RCRA allows "any person" to bring an action against

> any past or present generator, * * * who has contributed or who is contributing to the past or present handling,

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[12] The pulmonary diseases that make exposure to particulate pollution like that in question here are widespread. For example, in Idaho alone, a state with a population of just over a million, more than 78,000 children and over 195,000 adults suffer from asthma. Another 113,500 Idahoans suffer from chronic bronchitis. See American Lung Association, *Estimated Lung Disease Prevalence and Incidence by Lung Association Territory* at 15 (September 2004) (available at http://www.lungusa.org/atf/cf/%7B7A8D42C2-FCCA-4604-8ADE-7F5D5E762256%7D/ESTPREV2004.PDF) (last visited April 4, 2005).

> storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). It was "designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms[.]" *Meghrig v KFC Western, Inc.*, 516 U.S. 479, 486 (1996). Given the evidence noted above concerning the severe harms caused by burning of residue grass – and the far more extensive presentations in the record – this would seem to be a paradigm instance in which injured parties could use Section 7002 to obtain relief.[13]

The court of appeals' contrary conclusion is based upon an erroneous interpretation of the key RCRA jurisdictional term "solid waste." The majority construed that term not to embrace the grass residue at issue here on the theory that the residue was not "discarded" for purpose of the statutory definition, 42 U.S.C. § 6903(27). See Pet. App. A15-A18. The court reasoned that the farmers' use of the ash from burning the residue meant that the burning had "farming benefits," even though it was conceded that

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[13] See *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 988 (2d Cir. 1984) ("in amending the emergency powers provision of the RCRA in 1980, the Senate Report explained that the emergency powers provision 'is essentially a codification of common law public nuisance remedies,' emphasizing, however, that it 'should not be construed solely with respect to the common law' because some concepts 'are meant to be more liberal than their common law counterparts'") (quoting S.Rep. No. 172, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.Code Cong. & Ad.News 5019, 5023); see also Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, ALI-ABA C.L.E. C883 ALI-ABA 81, 95 n.80 (noting "public nuisance-like" character of the cause of action under § 6972(a)(1)(B), which does not require that activities creating the hazard be independently illegal under RCRA or any other law);

the overwhelmingly predominant reason for burning the residue was to clear the fields of bluegrass "straw" so that sunlight and water could reach the seed. The court's reasoning has no support on the face of the statute – or in the ordinary meaning of the term "discarded."[14] As petitioner demonstrates (Pet. 25-28), it is also inconsistent both with decisions of at least five other courts of appeals, and with EPA's definition of "solid waste" in EPA's RCRA Subchapter C regulations, see 40 C.F.R. Pt. 261, a definition that is intended to be significantly *narrower* than the statutory definition. EPA's regulations expressly cover wastes that are "returned to the soil as fertilizers," 40 C.F.R. § 261.4(b)(2). As petitioner demonstrates, because the opinion below is an interpretation of the RCRA's key jurisdictional term "solid waste," it imperils EPA's regulations governing RCRA's application to hazardous waste.

Thus, the court of appeals' narrow interpretation of "solid waste" – a key term not only for citizen actions under Section 7002 but for also for the hazardous waste provisions of Subchapter C – threatens to disrupt RCRA enforcement generally. If burning the residue grass at issue here is considered not to be a form of "solid waste" disposal, then many other activities that pose serious risks to the public – and are primarily intended to "get rid of" substances – could be exempted from RCRA regulation and remedies simply because the owner of the substance is able to claim some incidental use for the resulting ash – whether as fertilizer, as a traction agent for icy roads, or

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[14] See WEBSTER'S THIRD INTERNATIONAL DICTIONARY, 644 (1986) ("to drop, dismiss, let go, or get rid of as no longer valuable"; "Discard indicates dispensing with, letting go of, getting ride of, as not immediately useful; it is not a forceful word and may connote only the mild action of getting rid of a playing card from one's hand (['])he sorted and resorted his cargo, always finding a more necessary article for which a less necessary had to be discarded[']) – Willa Cather)").

simply as landfill.

As the dissenting judge persuasively explained, Pet. App. A24 n.6, there is also no merit to the Ninth Circuit majority's novel and counter-intuitive suggestion that the determination of whether secondary material has been discarded is to be made "independently of how the materials are being handled." Pet. App. A17 n.13. As other courts of appeals have recognized, it is often essential to examine how secondary materials are "handled" to determine whether they are "solid waste" for RCRA purposes. See, *e.g.*, *Owen Electric Steel Co. of South Carolina v. Browner*, 37 F.3d 146, 149 (4th Cir. 1994) (finding manufacturer not entitled to recycling exemption because "[t]he slag is not immediately used in Owen's production process; rather, the slag must sit, untouched, for some six months before it is sold to other entities."); *United States v. Marine Shale Processors*, 81 F.3d 1361, 1366 (5th Cir. 1996); *American Petroleum Inst. v. EPA*, 906 F.2d 729, 740-42 (D.C. Cir. 1999).

III. THE ABSENCE OF REMEDIES UNDER STATE LAW HIGHLIGHTS THE IMPORTANCE OF RCRA SECTION 7002 AS A MEANS TO PROTECT PUBLIC HEALTH.

Whatever avenues of redress are afforded by federal law, one might well expect that traditional common law remedies such as nuisance and trespass would be available under state law for health and environmental harms as grave as those involved in this case. But in the case of the Idaho bluegrass residue burning at issue here, that expectation would be wrong.[15]

As a result of the pattern of widespread health impacts discussed above, northern Idaho residents brought a class action in June 2002 against many of the respondents here, asserting claims based on nuisance and trespass. After a lengthy hearing at which numerous medical and public health experts and state official from Idaho and Washington testified, the state trial court found, *inter alia*, that the smoke emitted by defendants' burning of bluegrass residue had caused "these citizen plaintiffs to have increased medical problems, some very serious, which in turn causes some of them to hole up in their homes or to leave the area completely during the period of burning." Pet. App. in *Moon v. North Idaho Farmers Ass'n*, No. 04-594, at 135a-139a. On the basis of this and similar findings the trial court preliminarily enjoined defendants from burning. While the *Moon* case was pending, however, the defendant bluegrass farmers -- one of whom was also a state legislator -- persuaded the Idaho legislature to enact Idaho Code § 22- 4803A(6),

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[15] Although Idaho does impose some regulatory restrictions upon open burning of bluegrass residue, see Idaho Code § 4803 ("smoke management" program), those restrictions have proven wholly inadequate to prevent serious and widespread harms to the public health.

which provided that crop residue burning of the very sort at issue in the case "shall not constitute a private or public nuisance or constitute trespass."[16]

The unavailability of state remedies even in the face of dire harms like those here demonstrates the wisdom of Congress's decision to include, in RCRA, a broad remedy for citizens facing "imminent and substantial" health hazards. This Court should grant certiorari to ensure that that remedy may be given effect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 2005

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[16] Plaintiffs in *Moon* attacked the new legislation on the bases that the state had effectively imposed a servitude on their land, necessitating compensation, and that the law violated a state constitutional prohibition against "special legislation." The Idaho Supreme Court, with one justice dissenting, rejected these challenges. *Moon v. North Idaho Farmers Ass'n*, 96 P.3d 637 (2004), *cert. denied*, 125 S. Ct. 1299 (Feb. 22, 2005).

(4)

No. 04-1055

APR 6 - 2005

In The
Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF IDAHO MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

		Page
I.	INTEREST OF *AMICUS CURIAE*	1
II.	SUMMARY OF ARGUMENT	2
III.	ARGUMENT	3
	A. BLUEGRASS RESIDUE BURNING TRIGGERS A HEALTH CRISIS IN NORTHERN IDAHO EACH SUMMER	3
	B. BLUEGRASS RESIDUE FALLS WITHIN THE PLAIN MEANING OF "SOLID WASTE" IN THE RESOURCE CONSERVATION AND RECOVERY ACT	3
	C. THE COURT OF APPEALS' DECISION CREATES A SPLIT AMONG THE CIRCUITS ON THE INTERPRETATION OF THE CRITICAL STATUTORY TERM, "DISCARDED MATERIAL"	4
IV.	CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Owen Electric Steel Co. of South Carolina v. Browner, 37 F.3d 146 (4th Cir. 1994) 5

STATUTES

The Resource Conservation and Recovery Act, 42 U.S.C. § 6903(27) 2, 4

RULES

Sup. Ct. R. 37.6 1

BRIEF *AMICUS CURIAE* OF IDAHO MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER

The Idaho Medical Association ("IMA") respectfully submits this brief in support of the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed by Safe Air for Everyone.[1]

I. INTEREST OF *AMICUS CURIAE*

The IMA is an organization of 1800 medical care professionals in Idaho, including 1600 practicing physicians, and also retired physicians, medical residents, physician assistants, nurse practitioners, and medical students. Since its founding in 1893, the IMA has taken a leadership role in public health and safety issues. The IMA has actively supported and served the Idaho medical community and fostered high quality care for all Idahoans through its leadership in legislation, medical education, and public health.

The IMA has a direct interest in this Court granting certiorari to review the Court of Appeals' decision that deprives Petitioners of the ability to use the Resource Conservation and Recovery Act to address the adverse health effects arising from bluegrass residue burning.

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[1] Pursuant to Rule 37.6 of the Rules of the United States Supreme Court, the IMA states that no counsel for any party authored this brief either in whole or in part. No person other than the IMA, its members, and counsel made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondents have consented to the submission of this *amicus curiae* brief. Their letters of consent are being submitted with this brief.

Each summer, when bluegrass residue is burned in the fields of Northern Idaho, IMA members in the surrounding areas witness the suffering this practice causes. The burning poses a significant threat to the health of Idahoans, and a particular threat to the most vulnerable patients, including the very young and old, and those afflicted with chronic respiratory diseases such as asthma, cystic fibrosis, and emphysema. The adverse health effects caused by bluegrass residue burning are well documented in the record of this case, and responding to this threat falls squarely within the IMA's stated mandate of seeking to protect health and safety in the State of Idaho.

The IMA's duly elected Board of Directors has been authorized by the IMA to file this brief.

II. SUMMARY OF ARGUMENT

This Court should grant review to correct the appellate court's plain error in concluding that bluegrass residue left on a field and burned is not "solid waste" as defined under Resource Conservation and Recovery Act, 42 U.S.C. § 6903(27). This would both resolve a significant split among the circuit courts on the interpretation of a critical term used within the definition of solid waste – "discarded material" – and permit the Petitioners to proceed with their suit to protect the public health of Northern Idaho from the imminent and substantial endangerment residents suffer each year when the bluegrass fields are burned.

III. ARGUMENT

A. BLUEGRASS RESIDUE BURNING TRIGGERS A HEALTH CRISIS IN NORTHERN IDAHO EACH SUMMER.

The Petitioners amply documented in the district court the heavy burden the residents of Northern Idaho bear each year when the bluegrass fields are burned. IMA members such as the doctors who testified at the preliminary injunction hearing witness this burden in their offices and emergency rooms as the smoke sets off respiratory crises for the young, the old, and people of all ages with respiratory diseases such as asthma, emphysema, and cystic fibrosis. Evidence presented in the district court attributes at least three recent deaths to bluegrass burning.

The public health crisis caused by bluegrass burning is a regular event in Northern Idaho. IMA's core mission is to protect public health. Accordingly, we ask the Court to grant the writ of certiorari, review the Court of Appeals' decision, and restore to the Petitioners the ability to use the Resource Conservation and Recovery Act to prevent an imminent and substantial endangerment to public health.

B. BLUEGRASS RESIDUE FALLS WITHIN THE PLAIN MEANING OF "SOLID WASTE" IN THE RESOURCE CONSERVATION AND RECOVERY ACT.

The decision of the Court of Appeals turns on its elaborate parsing of the term "solid waste." No such parsing is called for in this case, because bluegrass residue falls squarely within the plain meaning of "solid waste" as defined in the statute:

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and *agricultural operations*. . . .

42 U.S.C. § 6903(27) (emphasis added). The statute provides no definition of "discarded material." However, the Petitioners presented evidence that the overwhelming reason that growers burn bluegrass residue is to get rid of it. Hence, the bluegrass residue is "discarded" within the ordinary use of that word. Furthermore, it is clear from the plain language of the statute that solid waste includes "material resulting from . . . agricultural operations. . . ." 42 U.S.C. § 6903(27).

The Court of Appeals' strained and confusing analysis is unnecessary because bluegrass residue left on a field and burned is plainly "discarded material." This Court should grant review to correct this error and allow the Petitioners to proceed with their suit to protect the public health of Northern Idaho from the imminent and substantial endangerment residents suffer each year when the bluegrass fields are burned.

C. THE COURT OF APPEALS' DECISION CREATES A SPLIT AMONG THE CIRCUITS ON THE INTERPRETATION OF THE CRITICAL STATUTORY TERM, "DISCARDED MATERIAL."

The Court of Appeals did not stop at the plain meaning of "discarded material." Instead, it grafted onto the statute an additional requirement, not grounded in the

statutory language or any accepted canon of statutory construction. It created a new requirement that "discarded material" be material that is *solely* discarded, and that has no other purpose except to be discarded, and held that if a material has any other use or purpose, it cannot be discarded material. Because it found that burning creates *some* benefit by fertilizing the ground, the Court held that bluegrass residue is not "discarded" but instead "beneficially reused." While this analysis clearly relies on an examination of how the bluegrass residue is handled, the Court nonetheless insisted that "the determination of whether grass residue has been 'discarded' is made independently of *how* the materials are handled." Pet. App. at A18, note 13.

The Court of Appeals' decision creates a loophole through which many materials could escape from regulation under the Resource Conservation and Recovery Act, a statute which was designed to be comprehensive in its protection of public health. Under this reasoning, one can imagine that a residue produced in an industrial process could escape regulation if it was "reused" by, for instance, landfilling to change a grade. According to the Ninth Circuit's analysis, the purpose of landfilling would trump the purpose of discarding, the residue could not be "discarded material," and RCRA would not apply. The Fourth Circuit faced similar facts in *Owen Electric Steel Co. of South Carolina v. Browner*, 37 F.3d 146 (4th Cir. 1994), and reached the opposite result, holding that slag used for road construction was solid waste within the meaning of RCRA, even though it was being "beneficially reused." This result highlights the conflict among the circuit courts created by the Ninth Circuit's decision in this case, which is set forth in detail in the Petition at pages 25-28.

The ability to bring a citizens' suit under the imminent and substantial endangerment provision of the Resource Conservation and Recovery Act is a critical tool for communities to protect themselves from threats to their health. By interpreting the term "discarded material" in a narrow manner that is inconsistent with the language and purpose of the statute and the decisions of other circuit courts, the Ninth Circuit has taken this tool out of the hands of the people of Northern Idaho.

IV. CONCLUSION

As argued by Petitioner, and supported by the foregoing additional reasons, we urge the Court to grant the Petition for a Writ of Certiorari and restore to Safe Air for Everyone the right to pursue its case.

Respectfully submitted,

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